United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,611

NATHAN L. DREW,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

JOINT APPENDIX

[Filed in Open Court Sep. 17, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on September 4, 1962

The United States of America	:	Criminal No. 771-62
v.	:	Grand Jury No. 951-62
Nathan L. Drew	:	Violation: 22 D.C.C. 2901, 2902 (Robbery; attempted robbery)

The Grand Jury charges:

On or about July 27, 1962, within the District of Columbia, Nathan L. Drew, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Mary M. Waley, property of High's Dairy Products Corporation, a body corporate, of the value of about $50.00, consisting of $50.00 in money.

SECOND COUNT:

On or about August 13, 1962, within the District of Columbia, Nathan L. Drew, by means of an overt act, that is, by saying, "Give me all the money", did attempt by force and violence and against resistance and by sudden and stealthy seizure and snatching, to steal, take and carry away from and off the person and from the immediate actual possession of Mary C. Hughes, valuable money and property.

/s/ David C. Acheson

Attorney of the United States in
and for the District of Columbia

* * *

[Filed Sep. 21, 1962]

PLEA OF DEFENDANT

On this 21st day of September, 1962, the defendant, Nathan L. Drew, appearing in proper person and by his attorney, Charles F. Liff, Esquire, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District of Columbia Jail.

By direction of

MATTHEW F. McGUIRE
Presiding Judge
Criminal Court # ASSIGNMENT

* * * * * *

[Filed Oct. 16, 1962]

MOTION FOR SEVERANCE

The Defendant, Nathan L. Drew, by and through his attorney, Charles P. Liff, hereby moves this Court to direct that separate trials be held on the two offences charged herein; and for reason therefore states that the joinder of offences is prejudicial in that Defendant is embarrassed and confounded in his defense. The Defendant further states that such severance should be ordered by the Court, in its sound discretion, pursuant to Rule 14 of the Federal Rules of Criminal Procedure.

/s/ Charles P. Liff
Attorney for Defendant

* * *

[Filed Feb. 19, 1963]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D. C.
Monday, December 17,1962

The above-entitled case came on for trial at 11:30 o'clock a.m., on Monday, December 17, 1962, in the United States District Court for the District of Columbia, in the Courthouse at Washington, D.C.

B E F O R E

HONORABLE JOHN J. SIRICA, Judge of the United States District Court for the District of Columbia, and a jury.

APPEARANCES:

Barry Sidman, Esquire, on behalf of the United States;

Charles P. Liff, Esquire, and Elliot H. Cole, Esquire, on behalf of Defendant.

* * * * *

MR. LIFF: Your Honor, would you care to hear a preliminary motion in advance of the voir dire?

THE COURT: No, I guess we better get the jury, unless it has something to do with the jury.

Does it have something to do with the case, I take it?

MR. LIFF: With the case, yes.

THE COURT: All right; well, let us get the jury first.

* * * * *

THE COURT: What I really wanted you for, you said something about having some motion that you wanted to make.

MR. LIFF: Yes. Well, I intend to renew the motion which has been previously made and denied, to sever the trials.

THE COURT: Well, then, maybe I better hear you. Restate it here.

MR. LIFF: May I go to my table for something for a minute?

THE COURT: Yes.

Now, this motion was previously decided by Judge Curran, wasn't it?

MR. LIFF: Yes, sir, but I intend to make it again. If I may state this to the Court, I want to make it again before we commence the trial, and at the end of the trial, if the Court should deny it now.

16 THE COURT: State the reasons briefly.

MR. LIFF: Briefly, I make this motion to sever based upon the fact that I feel that the joinder of two cases and charges such as this will tend to embarrass and confound the defense, and is therefore prejudicial, and we feel it will embarrass or confound us because we are put in the difficult position of deciding to have the defendant take the stand as to one charge, and not the other, and you cannot do that, and it means he would be taking the stand as to both charges, and the defendant becomes subject to everything that follows on both charges, and that we don't have the freedom of choice to which we are entitled.

He has the right to defend himself by taking the stand in one trial and not in the other, but if he testifies in one it tends to embarrass the defense in both, and in the trial it hinders us and embarrasses us in his defense.

I think the motion to sever should be granted because it is a trial of two distinct and completely unrelated events, with different sets of witnesses, and they have no relationship at all to each other, and should not be tried together, in the discretion of the Court, and in case he be tried, it should only be as to one trial or charge, and that there should be two separate trials.

17 I think that each of the trials depend pretty much upon identification, and this is prejudicial, because they tend to support each other, and this is why I had more challenges during the voir dire, anticipating the possibility of this line taking place, because the Court might deny the motion, and to have one witness identify the defendant as to an event, and another witness identify him as to another event, I feel must influence any human juror, because it tends to corroborate one by the other, and they will be proving an event separated by two weeks' time by the evidence in the other, and I think and I feel that I would have a great deal of difficulty were I a juror, and if the Court were a juror, in dividing the evidence in these cases.

THE COURT: Did you present this argument to Judge Curran?

MR. LIFF: Yes.

THE COURT: Did you oppose the motion?

MR. SIDMAN: Yes, sir.

MR. LIFF: Your Honor, it was based on the case of Chambers versus United States, decided on March 29th of this year.

This was only two weeks apart.

THE COURT: How much spread of time was there in that case?

MR. SIDMAN: In Chambers?

THE COURT: Yes, what date was that?

18 MR. SIDMAN: April 18th, 25th, and 27th; in other words, a period of nine days between; and here it was July 27th to August 13th.

We raised the case of Muller versus the United States, decided by the Court of Appeals, this Court of Appeals, and Hamil versus United States, 279 F. 2d 34, decided by the Eighth Circuit; and also in this case, we might point out that there is one continuation as to both crimes.

THE COURT: Well, this matter has been passed on before by Judge Curran?

MR. LIFF: It has, Your Honor, and I think this is important, and I think I should argue to this Court, and you should grant the motion.

THE COURT: Well, I have overruled other judges before, other District Judges, not the Court of Appeals.

MR. LIFF: Well, I ask you to grant the severance.

THE COURT: I will deny the motion. You have your record. You may raise it again.

MR. LIFF: I respectfully advise the Court I will raise it at the end of the trial again, and I advise the Court of that.

THE COURT: All right.

* * * * *

30 AFTER RECESS

(The trial was resumed at 2 o'clock p.m., pursuant to the recess).

THE COURT: All right, Mr. Sidman, are you ready to proceed? Call your first witness.

MR. SIDMAN: Miss Mary Waley.

Thereupon

MARY M. WALEY

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SIDMAN:

Q. Will you please speak loud and clearly and slowly and clearly, so we can all hear you.

Will you state your full name, please? A. Mary Madeline Waley.

Q. Do you live in the District of Columbia? A. Yes, I do.

Q. In July of this year, Miss Waley, who did you work for? A. High's Dairy Products, Incorporated.

Q. Now, specifically, Miss Waley, on July 27, 1962, did you work for High's? A. Yes.

Q. At which store? A. 5317 East Capitol Street, Northeast.

31 Q. Is that in the District of Columbia? A. Yes, sir.

Q. Now, directing your attention to the afternoon of July 27th, were you working in the store at that time? A. Yes, sir, I was.

Q. Now, directing your attention to the afternoon hours, did anything unusual occur? A. Yes.

Q. What was that? A. Approximately about 4 o'clock the store was robbed.

Q. The store was robbed? A. Yes.

Q. Now, I want you to think back several minutes before this occurrence took place, what were you doing? A. Well, I was in the milk box, filling it up.

Q. What? A. I was in the milk box, stocking the shelves.

Q. Stocking the shelves in the store? A. Yes.

Q. Did anyone enter the store? A. Yes, sir, a man.

Q. Where were you at this time? A. I was in the milk box.

Q. Could you see someone come into the store from where you

32 were? A. Yes.

Q. Now, when this person entered, how long was it before you met this person, before you came out? A. Approximately five minutes.

Q. And during this five minutes, what was happening? A. I was stacking the milk, putting it on the shelves.

Q. Now, could you observe this person who was in the front of the store? A. Yes, I could.

Q. Well, what happened then? What was the person doing, by the way? A. Well, standing, waiting for me to come out.

Q. Did you eventually come out? A. Yes, I did.

Q. What happened when you came out? A. Well, I came out and walked up to the cash register, and I asked him, May I help you?

And then he answered: This is a holdup; I want your money, all of it.

Q. Where were his hands when he said this? A. Well, one of them was in his pocket.

Q. Did he do anything with his hand? A. Well, he didn't then, and then when I stood there for a minute or two, and I could not get it, I was frightened, and he said: Get it, and he pulled a gun partly out of his pocket,

33 far enough for me to see it.

Q. Now, this person who did that, do you see this person in the court-room? A. Yes.

Q. Would you point to him and tell me what he is wearing? A. Well, he is wearing a brown suit.

MR. SIDMAN: May the record reflect that the witness identified the defendant Drew?

THE COURT: Suppose you step down and go over to the rear of him and put your hand on his shoulder.

(The witness complied with the request).

THE COURT: All right, step back.

MR. SIDMAN: Now, may the record indicate that the witness identified the defendant?

THE COURT: The record may so show.

BY MR. SIDMAN:

Q. Had you ever seen the defendant Drew up to that time, Miss Waley? A. No.

Q. Well, as I understand it, he repeated his statement and then drew a gun --

THE COURT: Well, I will ask counsel not to repeat the testimony. Ask what happened.

34 BY MR. SIDMAN:

Q. What happened after you just testified to? A. Well, I gave him the money I had in the drawer, and then when he was getting the money, a boy named Smallwood came through the front door, just as he was getting ready to turn and leave.

Q. How much money, if you know, did you give him? A. Approximately fifty dollars.

Q. Where did you take the money from? A. Out of the drawer of the cash register.

Q. In the store? A. Yes.

Q. Well, what did you do after this? A. I waited for him to get out of the door, and then I said to Smallwood, I was just robbed.

MR. LIFF: I object, Your Honor.

THE COURT: The jury will disregard that remark. Let me find out. Was the defendant there at the time you made that statement to Smallwood?

THE WITNESS: No, he was walking out the door.

THE COURT: Well, that took place out of the presence of the defendant, and the jury will disregard that statement.

All right, you may proceed.

BY MR. SIDMAN:

Q. Did there come a time thereafter, and I am not referring to

35 the 27th any more, did there come another time when you again saw the defendant? A. Yes.

Q. Where was that? A. At No. 14 Precinct.

Q. Now, can you remember approximately what date that was? A. The 13th, I think.

Q. Of what month? A. August.

Q. And under what circumstances did you see him? A. I saw him in the lineup.

Q. And what did you do when you saw him in the lineup?

MR. LIFF: I object to this, Your Honor.

THE COURT: All he said is what did you do? I think I will let the question stand.

What did you do?

MR. LIFF: Objection, Your Honor.

THE WITNESS: I picked him out of the lineup of approximately six men.

MR. LIFF: I object, Your Honor.

THE COURT: The objection is overruled.

MR. SIDMAN: I have nothing further, Your Honor.

THE COURT: You may examine.

36 CROSS EXAMINATION

BY MR. LIFF:

Q. Mrs. Waley, are you presently -- is it Miss Waley? A. Yes.

Q. Miss Waley? A. Yes.

Q. Are you presently employed by High's? A. No.

Q. Where are you employed now? A. Do I have to tell?

Q. Yes. A. Giant Food.

Q. Giant Food? A. Yes.

Q. What were the circumstances of your leaving High's, may I ask? A. Too dangerous.

Q. Too dangerous? A. Yes.

Q. That is why you left them? A. That is right.

Q. Now, coming back to the time you described in the afternoon of -- what date was that? A. I beg your pardon?

Q. When the burglary, the robbery that you testified about -- I
37 am asking what date it was. A. The 27th.

Q. Of what month? A. July.

Q. July? A. Yes.

Q. Now, coming back to that time, you say you were stocking the shelves? A. That is right.

Q. Now, when you stock the shelves with milk, that is from behind the milk container or milk cabinet? A. It is glass all in front, nothing but glass.

Q. You are anticipating me, Miss Waley.

THE COURT: Just try to answer his questions.

BY MR. LIFF:

Q. It is from behind, is it not? A. I don't understand your question.

Q. There is a cabinet, a milk cabinet in the store; is that correct? A. It is a milk box.

Q. A milk box? A. Yes.

Q. Now, where do you stand when you stock the shelves? A. In the box.

Q. In the box? A. That is right.

38 Q. And you were putting bottles on the shelves? A. That is right.

Q. And you do that from behind, that is not the sales area of the store, but from the service area in back, do you not? A. It is in the box.

Q. Well, I would like you to answer my question.

This is not out in front of the store, but in back of the store; is that correct? A. That is right.

Q. And then when you stand there, there is between you and anybody coming into the store, the glass shelves and the glass doors and the various bottles on the shelves? A. No.

Q. Well, will you describe the condition of that store to me then? A. Well, there is a showcase, glass, and where I was, I was stocking the milk and when I heard the door open, I then went to the front, all the way

up to the glass, to see who it was in front, so I could go out and wait on the customer, but then I didn't go right away because I thought I would put several more bottles on the shelf.

Q. How many more bottles did you put on the shelf? A. Five or six.

Q. Five or six? A. Yes.

39 Q. About six? A. Yes.

Q. And so you put about six more bottles on the shelf after the customer entered the store, before you went out; is that right? A. That is right.

Q. And you went out after you put the six bottles on the shelf? A. That is right.

Q. Now, Miss Waley, you were taking these bottles from a box out on the floor to put on the shelves? A. Yes.

Q. Now, do you recall testifying a few minutes ago when Mr. Sidman was questioning you about this event? A. Yes.

Q. Do you recall your testimony? Do you recall saying that you observed the defendant through the glass for a period of five minutes? A. Yes.

Q. Before you went out? A. Yes.

Q. Now, I presume that you are now telling us that it took you five minutes to put six bottles on the shelf? A. Well, let me tell you this --

40 Q. No, don't tell me --

THE COURT: Let her answer.

THE WITNESS: It was time for my lunch, you see.

THE COURT: Now, this is directed to both of you.

Mr. Liff, while she is testifying, please do not interrupt, and likewise when he is asking a question, don't interrupt him, because we cannot get a good record here. The reporter cannot report when two people talk at the same time.

All right, you can go ahead.

MR. LIFF: I believe the witness was finishing answering the question.

THE COURT: Do you remember the question?

THE WITNESS: I said it was time for my lunch, and I wasn't in a particular hurry to go out on the floor, so by then I was stretching around in the box, looking out front, and trying to wait for somebody else to go out.

BY MR. LIFF:

Q. When you told us a minute ago that you put the six bottles on the shelf and you went out, then that wasn't exactly correct, was it? A. Well, one thing I do know, I know who robbed me, and it is impossible for me to forget that thing.

Q. You are very anxious to convict this man, aren't you?

41 THE COURT: Now, I will have to exercise the power of the court if this does not stop. I am not going to tolerate either party arguing with the other.

Is that clear, Mr. Liff?

MR. LIFF: Very clear.

THE COURT: All right, and you too, Miss Witness, you are not to argue with counsel. You are here to tell what you know about this case. I won't tolerate this kind of testimony any longer; is that clear?

THE WITNESS: Yes, sir.

MR. LIFF: Your Honor, I respectfully request that the remarks of the witness in response to my last question be stricken, and the jury be directed to disregard it.

THE COURT: The jury will disregard it.

BY MR. LIFF:

Q. Now, returning to the events, Miss Waley, will you tell me now whether you waited five minutes to go out and serve the man and observed him during that period through the glass, or whether you went out after you put the six bottles up? A. I said approximately five minutes, it could have been six.

Q. Six minutes? A. It could have been.

42 Q. And this was after you put six bottles on the shelf? A. I wasn't in a hurry to go out.

Q. You were not in a hurry to go out? A. No.

Q. Now, when you came out, the man had his hand in his pocket, you say? A. When I approached the cash register.

Q. When you -- I am sorry, I didn't hear you. A. When I approached the cash register I said, May I help you? He had one hand, and he said: This is a holdup; I want your money, all of it.

Q. Now, you had told me that, and now would you please answer my question? Did the man have his hand in his pocket? A. Yes.

Q. Which hand in which pocket? A. Right hand.

Q. Right hand? A. Yes.

Q. Now, when he withdrew it, did he withdraw the hand all the way? A. No, he didn't.

Q. Just part? A. Far enough for me to see the gun.

Q. You saw a gun? A. I saw it.

43 Q. In his hand? A. I saw it.

Q. As surely as you saw him through the window for five minutes? A. I saw it.

Q. As surely as you saw him through the window? A. I saw him.

THE COURT: I will not permit you to argue with the witness.

MR. LIFF: Your Honor, I simply asked --

THE COURT: I said I won't permit that kind of cross examination. It is up to the jury to make up their minds as to whether they believe this witness or not.

Now, let's proceed. I don't want to have to repeat it again.

BY MR. LIFF:

Q. Now, you say approximately $50 was taken? A. It was estimated that, yes.

Q. Well, did they take a count of your register later? A. They did.

Q. How much did they find to be missing? A. Fifty dollars.

Q. Precisely fifty dollars? A. That is right.

44 Q. No more and no less? A. Fifty dollars.

Q. I asked, Miss Waley, was it precisely fifty dollars? A. Well,

I am telling you what they told me. They told me it was fifty dollars.

Q. Did you have more money in the register than that? A. I gave him everything I had in it, pennies and all.

Q. And that was everything, precisely fifty dollars? A. That is right.

Q. Now, when you came to identify Mr. Drew at the 14th Precinct, you stated that there were six men in the lineup? A. I said there were approximately six men in the lineup, meaning I didn't count them.

Q. Are you doubtful about that? A. I know it was five or six.

Q. Five or six? A. Yes, sir.

Q. Were they all of the same height as Mr. Drew? A. No, they were not.

Q. They were of different heights? A. Yes.

Q. Was there any other man in the lineup of the same height as Mr. Drew? A. I wasn't looking at the height, I was looking at the man. When I walked in and saw Mr. Drew, I identified him.

45 Q. Miss Waley, you have a very serious task to perform --

MR. SIDMAN: Objection, Your Honor.

THE COURT: Mr. Liff, I don't think we are going to get anywhere by telling this lady what is in your mind, or what kind of a task she has to perform. Ask her the direct questions and let her give her answers to the questions and wait until the time you argue the case the jury to draw the inferences you wish from the testimony.

BY MR. LIFF:

Q. Now, did you look carefully at each of the men? A. I did.

Q. And can you tell us now whether there was any other man in the lineup of the same height as Mr. Drew? A. Well, I didn't think that was necessary for me to --

THE COURT: Well, answer the question, not what you thought was necessary.

Did you see anybody in the lineup of the same height as the defendant -- is that the question.

THE WITNESS: Yes.

BY MR. LIFF:

Q. Now, was Mr. Drew dressed in the same clothing he has on now? A. No.

Q. What kind of clothing was he wearing at that time? A. He had on a topcoat then.

46 Q. What kind of jacket did he have on? A. Well, when I identified him he had on a light topcoat --

Q. A light topcoat?

MR. SIDMAN: Objection, Your Honor. The witness has identified the defendant.

THE COURT: No, this is cross examination.

BY MR. LIFF:

Q. He had on a light topcoat, and by that you mean something more than a suit jacket? A. A long coat.

Q. Did he have a hat on at the time? A. He did.

Q. Did he have anything else on? A. He had on sunglasses.

Q. He had on sunglasses too? A. Yes.

Q. And so your identification was through the sunglasses, wasn't it? A. No, they weren't, because they had all the men take their glasses off.

Q. Now, when he was in the store, was the man who came in the store wearing sunglasses? A. He was wearing sunglasses.

47 Q. And you required them to take the sunglasses off so that you could identify him? A. No, that wasn't necessary, but that was the idea.

Q. In other words, you didn't identify him without the sunglasses, but you identified him with the sunglasses? A. I identified him with and without the sunglasses.

Q. Had you ever seen him without sunglasses before the lineup? A. I know him when I see him.

MR. LIFF: May I ask the witness to answer my question, Your Honor?

THE COURT: Repeat the question.

BY MR. LIFF:

Q. Had you ever seen him without sunglasses before the lineup? A. No.

Q. Then you didn't know what his eyes looked like before the lineup? A. I didn't even know his eyes; I didn't see his eyes; I saw him.

Q. Miss Waley, the only time you saw the man who you alleged robbed you was when he was wearing sunglasses? A. Was the day he robbed me.

Q. And he was wearing sunglasses? A. Yes, he was.

48 Q. And you never saw him without sunglasses? A. I saw him when I identified him, with and without sunglasses.

Q. May I ask you, Miss Waley, until the identification, you never saw him without sunglasses; is that correct? A. That is correct.

Q. And you identified him with sunglasses; is that correct? A. With and without sunglasses.

Q. And you insist that you are able to tell, identify him without sunglasses? A. With and without sunglasses.

Q. What were the words this man used when he came into the store, that is, when you came out, after you had been in the back as long as it takes to put in six bottles of milk? A. He said: This is a holdup.

Q. What else did he say? A. I want your money, all of it.

Q. Those were the words? A. That is what he said.

Q. How many times have you told this story to anybody in the past four or five months? A. About twice.

Q. Did you tell this story to anybody in the courtroom, or the courthouse today? A. I did not.

49 Q. Did you discuss this case with anybody today? A. I did not.

Q. Did you discuss this case with anybody within the last month? Look at me, Miss Waley. A. Yes.

Q. You did?

MR. SIDMAN: Your Honor, may I ask that the remark of the defense counsel be stricken.

THE COURT: Well, I don't know where the witness was looking. I wasn't looking at her.

Now, we are not going to have any side remarks by either Government counsel or defense counsel.

All right, let us proceed.

BY MR. LIFF:

Q. You did? A. Yes.

Q. Now, Miss Waley, did you at any time identify anybody else as the man who held you up? A. Never.

Q. You didn't? A. Never.

Q. Never? A. No.

50 Q. Are you sure of the date? A. I beg your pardon?

Q. Are you sure of the date?

MR. SIDMAN: Your Honor, may I ask that the question be made more specific?

BY MR. LIFF:

Q. Well, are you sure of the date you gave for the holdup, the robbery? A. Yes.

Q. And you remember that date? You remember that? A. It is impossible to forget it.

Q. What was the day of the week? A. It was on the 27th day.

Q. What day of the week? A. I don't know, but I know it was on the 27th.

Q. But you can't forget that it was the 27th, but you don't remember the day of the week? A. It wasn't necessary for me to remember the day, as long as I know the date.

Q. Who told you that? A. Who told me?

Q. Yes. A. I was there.

Q. Who told you it wasn't necessary to remember the day of the week, only the date of the month? A. I told myself.

51 Q. You told yourself? A. Yes, sir.

Q. And you knew it wasn't necessary, so you promptly forgot it? A. Well, I figured you would know that.

Q. I do know it. Do you know it?

THE COURT: Now, counsel, I don't want to have to tell you again. You are not going to argue with a witness. Let the jury decide what the facts are in the case.

Let us proceed.

BY MR. LIFF:

Q. Do you know the date? A. The 27th.

Q. Of the week?

THE COURT: She said she didn't know the day of the week. Now, let us proceed.

MR. LIFF: That is all, Your Honor.

REDIRECT EXAMINATION

BY MR. SIDMAN:

Q. Miss Waley, is there any doubt in your mind as to whether that man is the one who came into the store on the 27th? A. None at all.

MR. LIFF: I object to that, Your Honor.

52 THE COURT: The objection is overruled.

BY MR. SIDMAN:

Q. Now, Miss Waley, why, and I want you to be quite right now, why --

MR. LIFF: I object, Your Honor.

THE COURT: I haven't heard the question yet.

BY MR. SIDMAN:

Q. Miss Waley, I want you to give the ladies and gentlemen of the jury the reason why it took you, as it testified, about five minutes to come out and wait on this customer?

THE COURT: Didn't she already say that? Hasn't she already testified to that?

MR. SIDMAN: I think it was not clear.

THE COURT: I think she has already testified to that.

MR. SIDMAN: Then I have no further questions, Your Honor.

THE COURT: All right, you may step down.

(The witness was excused).

THE COURT: Call your next witness.

Thereupon

ROLAND M. TWOMBLY

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

53 DIRECT EXAMINATION

BY MR. SIDMAN:

Q. Will you state your name for the Court and the ladies and gentlemen of the jury? A. Roland M. Twombly.

Q. Now, where are you employed, sir? A. High's Dairy Products.

Q. How long have you been employed there, sir? A. Six years.

Q. And in what capacity, sir, are you employed there? A. Store supervisor.

Q. Over how many stores do you have supervision? A. Seventeen.

Q. Sir, do you recognize the corporate seal of the corporation? A. Yes, sir.

MR. SIDMAN: Your Honor, may I have this seal marked as Government Exhibit 1 for identification?

(The article was marked Government Exhibit No. 1 for identification).

BY MR. SIDMAN:

Q. I show you what has been marked Government Exhibit 1 for identification, and ask you can you recognize that? A. Yes, sir.

Q. What is it? A. It is the corporation seal of the company.

54 Q. Does it indicate where the High's Dairy Products Corporation is incorporated? A. Yes, sir.

Q. Where is that, in what jurisdiction? A. Of Delaware.

Q. And does the High's Dairy Products Corporation do business in the District of Columbia, sir? A. Yes, sir, they do.

MR. SIDMAN: I have no further questions.

THE COURT: Does it operate a store at this address? What is the address?

MR. SIDMAN: There are two addresses, sir.

BY MR. SIDMAN:

Q. Mr. Twombly, does High's operate a store to your knowledge at 5317 East Capitol Street? A. Yes, sir.

Q. And does it also operate a store at 5119 Grant Street? A. Yes, sir, it does.

BY THE COURT:

Q. Did it own and operate those stores on July 27th of this year? A. Yes, sir.

MR. SIDMAN: I have no further questions, Your Honor.

55 CROSS EXAMINATION

BY MR. LIFF:

Q. Mr. Twombly, do you know anything about the circumstances of these events that we are inquiring into today? A. All I know is that one of them was robbed.

Q. You don't know anything beyond that? A. No.

Q. Do you know how much was taken from the store that was robbed? A. No, sir, I don't. I was on vacation at the time.

MR. LIFF: That is all.

THE COURT: All right, step down.

(The witness was excused.)

MR. SIDMAN: Call Mr. Smallwood.

Thereupon

PAUL SMALLWOOD

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SIDMAN:

Q. Will you state your name to the Court and jury? A. Paul Smallwood.

Q. Where do you live? A. 19 53rd Place, Southeast.

Q. Is that in the District of Columbia? A. Yes, sir.

56 Q. Are you familiar with a High's Store at 5317 East Capitol Street? A. Yes, sir.

Q. Have you ever been in there? A. Yes, sir.

Q. Before we go on, do you know this defendant? A. No, I don't.

Q. I want to direct your attention to July 27th of this year, did you have occasion to go into that store on that day? A. Yes, sir, I did.

Q. Now, describe the circumstances, if you will, what happened when you went in the store?

MR. LIFF: Your Honor, I don't know what time this is.

BY MR. SIDMAN:

Q. When did you go in the store on that day, Paul? A. I don't know the exact time.

Q. Was it in the morning or in the afternoon? A. In the afternoon.

Q. In the afternoon? A. Yes.

Q. Now, you went in the store in the afternoon, and what happened when you went in there? A. When I went in the store, a fellow passed

57 me coming out, and when I went up to the counter, he turned away from me, and went out of the way, and went out the door, and the lady told me that --

MR. LIFF: Your Honor, I object.

THE COURT: Wait a minute. The objection is sustained. You can't say what the party told you.

MR. LIFF: Your Honor, I object to the remainder of the answer on the ground that this has no identity with the defendant at all.

THE COURT: Let us find out.

MR. LIFF: It is just a man.

THE COURT: Let us find out whether it has or not.

BY MR. SIDMAN:

Q. Did you see the face of the man who left the store? A. No, I didn't.

MR. SIDMAN: Your Honor, I have no further questions.

THE COURT: Do you have any questions?

MR. LIFF: I have no questions of this witness, Your Honor.

THE COURT: All right, you may step down.

(The witness was excused.)

MR. SIDMAN: Call Mary Hughes.

Thereupon

MARY C. HUGHES

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

58 DIRECT EXAMINATION

BY MR. SIDMAN:

Q. Mrs. Hughes, will you speak up so that everybody can hear you? Will you tell your name to the Court and jury? A. Mary C. Hughes.

Q. Is it Mrs.? A. Mrs. Hughes.

Q. Do you live in the District of Columbia? A. Yes, sir, I do.

Q. Mrs. Hughes, on August 13, 1962, did you work for High's Dairy Products Corporation? A. Yes, I did.

Q. In what store? A. At 5119 Grant Street, Northeast.

MR. LIFF: Your Honor, I respectfully object to the line of questioning. I think the prosecutor's question has now identified the exact time and place.

THE COURT: You object on the ground it is leading?

MR. LIFF: Leading.

THE COURT: All right, you may reframe the question.

BY MR. SIDMAN:

Q. Where did you work on August 13, 1962?

MR. LIFF: I object, Your Honor.

THE COURT: The objection is overruled. He can ask that question.

59 THE WITNESS: 5119 Grant Street, Northeast.

BY MR. SIDMAN:

Q. Now, what is that establishment there? A. High's Dairy.

Q. Is that a High's Store? A. Yes.

Q. Now, specifically directing your attention, Mrs. Hughes, to

August 13, 1962, were you working on that day? A. Yes.

Q. In that store? A. Yes.

Q. Was there anybody else working in that store at that time? A. No, not with me.

Q. Now, did anything unusual happen on that day? A. Yes.

Q. What was that? A. Drew came in --

THE COURT: Who came in?

THE WITNESS: That man sitting over there, and he walked in, and I asked him, what are you having, and he said, a bag of peanuts.

And I said: What size, we have a five or ten.

60 And he said, Five, and he never did give me the five cents for the peanuts, and he said: Give me all the money.

And I said: If you want it, come and get it.

And he kept repeating the same thing, and so did I, and a customer walked in, and he went out.

Q. Was this a woman customer or a man customer? A. A woman customer.

Q. Now, about what time was all this happening that day? A. I would say about approximately six o'clock.

Q. And how long was he in the store? A. Before the customer came in?

Q. Yes. A. Well, I guess around about three or four minutes, something like that, before she came in.

MR. LIFF: I could not hear the last part, Your Honor.

THE COURT: Repeat the last answer, please.

THE WITNESS: About three or four minutes, before the customer walked in.

BY MR. SIDMAN:

Q. Well, did he leave at the time the lady customer walked in? A. Yes, he did.

Q. What did you do then after he left? A. Well, the lady customer walked in and I said to her --

61 Q. Don't tell me what you said to her.

MR. LIFF: Objection, Your Honor.

THE COURT: The objection is sustained.

THE WITNESS: Well, I went to the phone and I called the police precinct, the 14th Precinct, and I gave them a description of the man, and they picked him up soon.

MR. LIFF: Your Honor, I object.

THE COURT: Now, just a minute. We cannot all talk at one time. The reporter cannot possibly report this.

Do you object?

MR. LIFF: Yes, sir.

THE COURT: The objection is sustained.

You can't tell what somebody else did.

BY MR. SIDMAN:

Q. Now, did there come a time, Mrs. Hughes, when you saw -- well, let me interrupt you. This fellow Drew, the fellow that came in the store, do you see him in the courtroom? A. Yes, I see him in the courtroom.

Q. If you see him in the courtroom, Mrs. Hughes, would you walk over to where he is sitting and point to him? A. (The witness complied with the request).

MR. SIDMAN: Your Honor, may the record reflect that the witness identified the defendant?

62 THE COURT: All right. Come back.

BY MR. SIDMAN:

Q. Now, go back to your chair.

Now, did there come a time, Mrs. Hughes, when you saw the defendant Drew again? A. Well, when they --

Q. Just Yes or No? A. Yes.

Q. Where was that that you saw him? A. At 5119 Grant Street.

Q. At the store? A. Yes.

Q. Who was with him? A. A policeman.

MR. SIDMAN: Will you indulge me a moment, Your Honor?

I have no further questions, Your Honor.

THE COURT: You may examine.

CROSS EXAMINATION

BY MR. LIFF:

Q. Now, Mrs. Hughes --

BY MR. SIDMAN:

Q. I have one further question.

Do you know the name of the woman that entered the store when the defendant left? A. No, I don't.

63 THE COURT: All right, Mr. Liff.

BY MR. LIFF:

Q. Now, Mrs. Hughes, after the man who came into the store left, you called the police; is that correct? A. Yes, I did.

Q. Now, what police station did you call? A. The 14th Precinct, Northeast.

Q. Did you look up the number or did you ask the operator? A. I asked the operator.

Q. You went to the register and got a coin? A. Yes, I did.

Q. And you used the pay box? A. The pay telephone, yes.

Q. Where is that pay box, the pay telephone? A. Well, it is right, as you walk in the front, to the left. It is right inside the gate.

Q. And you asked the operator to connect you or did you dial the number? A. I asked the operator to connect me with the 14th Precinct, Northeast.

Q. And she did connect you? A. Yes.

64 Q. And you spoke to somebody there? A. Yes, I told them what happened.

Q. Did you tell them what happened? A. Yes, I did.

Q. How did you describe it? Did you give all the details? Don't describe it, but did you give them all the details of what happened? A. Yes, I did.

Q. Gave them all the details? A. Yes.

Q. And did they tell you they would send a policeman down? A. Yes.

Q. And did the police then come to the store? A. Well, they came to the store, yes.

Q. And you told them about it again? A. Yes.

Q. And then they went out? A. Yes.

Q. And later on they came back? A. Yes.

Q. And when they came back they had somebody with them; is that right? A. Yes, they did.

Q. So if I understand this correctly, after the event about which
65 you testified you went to the telephone and called --

MR. SIDMAN: Your Honor, I don't think the lawyer need summarize what the witness testified to.

THE COURT: Well, you can ask leading questions, put it in the form of a leading question.

BY MR. LIFF:

Q. You went to the telephone and you called up the police station and told them what had happened in some detail, and they said they would send the police, and the police came, and you told them again, and then they went out and later came back with somebody? A. Yes, they did.

Q. Is that the way it happened? A. Yes.

Q. How long a time elapsed between the time they went out from the store and the time they came back? A. Well, I would say about ten or fifteen minutes.

Q. Ten or fifteen minutes? A. Yes.

Q. And when they came back they had somebody they were holding on to? A. Yes.

Q. And he was the only man they were holding on to? A. Yes.

Q. And they said to you something, and don't tell us what they
66 said, but they had a man in their custody at the time? A. Yes.

Q. Well, now, do you remember how this man was dressed when he came into the store the first time? A. Well, I knew what kind of coat he had on, and hat, but I didn't notice his pants.

Q. You didn't notice that? Did he have anything on his face? A. No, he didn't. He had on a little cap, a short cap.

Q. Did he have sunglasses on? A. Yes, he did.

Q. When I asked you before whether he had anything on his face, you said No, he didn't, and then when I asked you whether he had sunglasses, you said Yes; is that correct? A. Well, he had on sunglasses.

Q. And so the fact is that he had sunglasses on? A. Yes, he did.

Q. Now, you said you identified him when they brought him back in? A. Yes, I did.

Q. And you said this was the man? A. Yes, I did.

Q. And when he was brought back in, did he have glasses, the man
67 they brought back in have glasses on? A. No, he didn't.

Q. I see. But you identified him without the glasses? A. Yes, I did.

Q. Now, the time that elapsed between the first time the police came and the second time they came was ten or fifteen minutes; is that correct? A. After the first time they came in?

Q. The police came? A. Yes.

Q. And the second time they came some ten or fifteen minutes later? A. Yes.

Q. How much time elapsed from the time that a man went out of the store to the time that the police first came to the store? A. I beg your pardon? I didn't follow that.

Q. How much time elapsed from the time, went by, from the time that the man left the store to the time when the police first came to the store and you described to them what happened? A. Well, about ten minutes, not more than fifteen.

Q. So the total elapsed time between the man leaving the store and the police coming back into the store with a man was about 25 minutes; is that right? A. Yes.

68 Q. Now, Mrs. Hughes, you did say, I believe, that you identified the man without the sunglasses? A. Yes, I did.

Q. Now, I want to ask you to examine your memory and think carefully, and tell me whether or not isn't this true, that when the policeman brought a man back into the store you asked that he put on his sunglasses

before you could identify him? A. No, I didn't.

Q. You did not? A. No, I didn't.

Q. What time of the day was this? A. This happened around about six, I would say.

Q. The man was in the store for how long? A. Well, he wasn't in there any more than about three or four minutes.

Q. And during this time you were debating with him, he was asking for the money, and you were saying, Come and get it? A. Yes.

Q. Did he do anything else? A. No, he didn't. I just told him to come and get it if he wanted it.

Q. And he kept asking for it? A. Yes.

69 Q. He didn't do anything, he didn't threaten you in any way?

MR. SIDMAN: Objection, Your Honor.

THE COURT: The objection is overruled.

BY MR. LIFF:

Q. He just asked for it, and you said No, and he asked for it again; is that correct? And that kept on for three or four minutes? A. Until a customer came in.

He said: You are not going to give me that money? And I said: No, if you want it, come and get it.

Q. This was a debate?

THE COURT: Now, don't characterize it.

MR. LIFF: I am sorry, Your Honor. I apologize.

THE COURT: After all, you must not do that, counsel.

BY MR. LIFF:

Q. Didn't you say before that he walked out and the customer came in as he was walking out? A. I said he walked out when a customer came into the store.

Q. One was walking out as the other was walking in; is that correct? A. Yes.

70 Q. He started to walk out before the customer came in; isn't that correct? A. No, he went out -- I don't know which one went out the door first, but I know the customer came in and he went out.

Q. You don't know which one went out the door first?

How many went out the door? A. It wasn't but one man in there, and that was Drew.

Q. Did they leave together? A. No.

MR. SIDMAN: Objection, Your Honor.

THE WITNESS: The lady came in and Drew went out.

BY MR. LIFF:

Q. Well, I understood you to say a minute ago you didn't know which one went out first. Did they go out together? A. No, they didn't.

Q. Did you ever see the defendant again from the time that they brought a man into your store, the police brought a man in, until today? A. No.

Q. You never saw him again? A. No.

Q. Now, have you discussed this case with anybody? A. No, I haven't.

71 Q. Have you discussed this case, Mrs. Hughes, with the other witnesses in the case? A. No, I haven't.

Q. Have you been in their company here in the courthouse on this day and a previous day? A. Have I been in the courthouse?

Q. In company with Miss Waley, the lady with the blue sweater there? Have you been in her company, in the hallways and other parts of this building, for two days now, today and a previous day? A. Not all the time, because I come in early.

Q. But you have been in her company? A. Yes.

Q. And you have not discussed the case with her at all? A. No, not what happened in my store.

Q. You have not discussed the case with her? A. No.

Q. And that is what you are telling the Court and the jury? A. That is right.

Q. And this is what you want us to believe?

THE COURT: That is argumentative. That is a question for the jury to decide, not you.

MR. LIFF: I have no further questions of this witness, Your Honor.

72 REDIRECT EXAMINATION

BY MR. SIDMAN:

Q. Mrs. Hughes, if you can remember, about how many times did the defendant make the demand for the money? A. Well, I really don't know how many times, but I know when he was saying, Give me the money, I said: If you want it come and get it.

Q. Would it be more than, let us say, four? A. I guess approximately three or four times, and the last time he said: You are not going to give me that money? And I said: No, you have to come and get it.

MR. SIDMAN: I have no further questions, Your Honor.

THE COURT: All right, step down.

(The witness was excused.)

MR. SIDMAN: Call Detective Rogers, please.

Thereupon

CARLTON L. ROGERS

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SIDMAN:

Q. Will you please state your full name to the Court and jury? A. Carlton L. Rogers.

73 Q. What is your duty assignment, please? A. Assigned to the 14th Precinct, Detective.

Q. You are a detective, sir? A. That is right.

Q. Detective Rogers, were you so assigned to the 14th Precinct on August 13, 1962? A. I was.

Q. And now did you have occasion to investigate a robbery on that day, Detective Rogers? A. On the 13th?

Q. The 13th of August? A. I did.

Q. Now, where did that robbery take place? A. At the High's Store, 5119 Grant Street.

Q. Did you have occasion during the course of your investigation to see the defendant in this case? A. I did.

Q. About what time was it that you first saw the defendant, if you recall? A. He was brought to No. 14 Precinct by Officer Olds about 4:35 or 4:40 p.m.

Q. 4:40 p.m.? I am talking about August 13th now.

MR. LIFF: Your Honor, I object. The witness has answered the question.

THE COURT: All right, repeat the question.

74 BY MR. SIDMAN:

Q. I am referring to a robbery which occurred on August 13th, 1962, Detective Rogers. And I am asking you when it was on the 13th that you first had occasion to see the defendant Drew? A. May I refer to my notes?

Q. Yes.

THE COURT: Yes.

THE WITNESS: About 5:45 p.m.

BY MR. SIDMAN:

Q. Now, was he booked at that time? Or what time was he booked? A. He was booked at 5:45 p.m.

Q. Booked at 5:45 p.m.? A. Yes.

Q. Now, did there come a time, Detective Rogers, when you questioned the defendant? A. I did.

Q. And approximately what time was that? A. As soon as he had -- as we had finished getting the information for our arrest book.

MR. LIFF: May we approach the bench?

(Thereupon counsel approached the bench and the following occurred):

MR. LIFF: I think and I surmise that this officer's testimony goes

75 to a claimed confession before arraignment.

MR. SIDMAN: That is correct.

MR. LIFF: And I wish to make my objection --

THE COURT: Well, then, do you wish to examine him out of the presence of the jury?

MR. SIDMAN: I do.

MR. LIFF: I think I would do that, Your Honor.

THE COURT: Well, we will take a ten-minute recess first.

MR. SIDMAN: We will need some time.

* * * * *

113 MR. LIFF: May I ask for the guidance of the Court on one point relating to the inquiry, that if the defendant takes the stand for the purpose of refuting the statements with respect to the confession, will it be held that he has taken the stand for all purposes?

THE COURT: Well, I haven't given that any thought yet. He is not going to take the stand? You haven't put him on yet.

114 MR. LIFF: I haven't determined that yet, Your Honor.

THE COURT: Well, I think if he takes the stand to refute what they say, and he doesn't take the stand in his defense, I doubt whether I would let him do that, but I don't know yet.

MR. LIFF: Well, I would like to have the Court's ruling before that.

THE COURT: Well, let us conclude this in the morning then. I said I haven't made up my mind yet. This is all out of the presence of the jury anyway, you understand that.

MR. LIFF: I understand that.

THE COURT: All right, we will now adjourn until 10 o'clock tomorrow morning.

(Thereupon at 4:05 o'clock p.m. an adjournment was taken until 10 o'clock a.m. on Tuesday, December 18, 1962).

* * * * *

115 Washington, D.C.
Tuesday,
December 18, 1962

* * * * *

135 THE COURT: Now, do you have any more evidence, Mr. Sidman, on this particular phase of the case?

MR. SIDMAN: Not on the voluntariness of the confession.

136 THE COURT: Do you have anything to offer, Mr. Liff?

MR. LIFF: No, sir.

THE COURT: You rest?

MR. LIFF: Not quite. I would like to know if the Court would hold that if the defendant takes the stand on this issue, whether he would be held to have taken the stand for all purposes, or whether it would be restricted to this issue.

THE COURT: Now, this is the Court's decision.

If he wants to take the stand, that is his right to do so, no one can force him to take the stand. This Court does not advise counsel, you, or the defendant, or anybody else, what ruling the Court will make under certain circumstances. The Court will not tell you at this time because the Court does not know what ruling the Court might make at a future time during this trial.

If you wish to put him on the stand, you may do so. That is your decision. I think I have answered your question.

MR. LIFF: Yes, Your Honor.

I wonder whether the Government will stipulate that if we put him on the stand for this issue, that it would waive the right to call him for the stand for other purposes.

THE COURT: I don't know what the Government can stipulate.

MR. LIFF: I ask the Government that.

137 THE COURT: I won't make any ruling until I am required to make a ruling.

If you want to put him on the stand you may; if you don't, you don't have to.

MR. LIFF: May I confer with Mr. Sidman a minute?

THE COURT: Yes.

MR. LIFF: Your Honor, we have nothing further.

THE COURT: You have nothing further?

MR. LIFF: No.

THE COURT: Now, do you object to this statement being received in evidence?

MR. LIFF: Yes, Your Honor, I do.

THE COURT: Well, the objection is overruled.

Let us proceed. Call the jury in.

MR. LIFF: May I have an exception to that?

THE COURT: You don't have to have an exception. Your objection is on the record.

(Thereupon the jury entered the courtroom.)

THE COURT: Good morning, ladies and gentlemen of the jury.

Is Mr. Rogers here?

Thereupon

CARLTON L. ROGERS

was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

138 MR. SIDMAN: I wonder if it is possible for the reporter easily to find where we were when we left off yesterday with Detective Rogers?

(The last question and answer referred to were read by the Reporter.)

DIRECT EXAMINATION (Resumed)

BY MR. SIDMAN:

Q. What was the time of the day that Drew was booked, do you recall? A. I believe it was 5:55.

Q. And what thereafter happened, after the defendant was booked? A. He was taken upstairs, and we have to make what we call a lineup sheet on the defendant, and obtain his name and address, and information necessary to have him processed through our Identification Bureau.

Q. Did he give you his correct name? A. He did not.

Q. After you got this information, what happened? After you made up the lineup sheet? A. Well, the lineup sheet wasn't actually completed until after a lineup was held. It was started but had not been completed.

Q. When was the lineup held? A. The lineup was held about 6:10 p.m.

139 Q. Who conducted the lineup? A. I did.

Q. For whose benefit, that is, who was the person that viewed the people in the lineup? A. Mrs. Mary Waley.

Q. Now, if you can recall, about how many people were in the lineup? A. It was five, including the defendant.

Q. And after the lineup, was the defendant identified? A. He was identified by Mrs. Waley.

MR. LIFF: I object to this, Your Honor.

THE COURT: The objection is overruled.

BY MR. SIDMAN:

Q. What happened after the lineup? A. Detective Chaplin and myself took himto the room adjoining our office and talked to him, and Detective Chaplin had what we call a robbery bulletin and Chaplin started asking him about prior cases.

Q. Now, let me interrupt you just a moment, Detective Rogers. This conversation took place, as I understand it, between the defendant and you and Chaplin? A. That is correct.

Q. Were any promises made to the defendant by either you or Chaplin to the defendant? A. None whatsoever.

140 Q. Were any threats made to him? A. None whatsoever.

Q. Anything done to him, any pressure or coercion of any sort? A. No, sir.

Q. Was your conversation about the robbery? A. It was, sir.

Q. And this was subsequent to the identification, the lineup identification, right after the lineup identification? A. That is right.

Q. Approximately what time would that be? A. I don't know what time he actually left the station to go to the Identification Bureau, I don't know.

Q. No, I am not talking about the Identification Bureau.

I mean, what time was the conversation that you had with him in the station? A. This was immediately following the lineup. The lineup was conducted about 6:10, so it would have been around 6:15.

Q. Now, can you tell the ladies and gentlemen of the jury and His Honor what this conversation was, what was said? A. Well, this particular conversation, we asked him if he had did this robbery in the attempt, and he said he did, but there would be no need for us to write
141 it down as when he got to Court he would have to deny it.

Q. Did you ask him about both the robbery on July 27th and the attempt on August 13th? A. That is right.

Q. Was his denial -- was the statement made with reference to both of them? A. Both, both the attempt and the robbery.

MR. LIFF: I object to this, Your Honor. I would like to have the conversation rather than --

THE COURT: All right, just give the conversation that you had with him.

BY MR. SIDMAN:

Q. Now, had the defendant been warned of his rights? A. Yes, he had.

Q. What was the warning and when was it given to him? A. It was given to him when he was taken upstairs to our office, and I had told him that he had been identified as the person who had attempted to hold up a High's ice cream store, and I gave him the address, and he could give a statement then if he wanted to, and if he didn't want to, according to the Constitution, he didn't have to, according to the Constitution, and I also told him at that time, at the same time, that we had called another victim of a robbery --

THE COURT: All right, don't let's talk about any other robbery,
142 other than the two involved in this case.

THE WITNESS: That is the other one I am referring to, Your Honor.

THE COURT: Very well. You may proceed.

THE WITNESS: That Miss Waley was asked to come down, and if she was able to identify him as being the same person that held her up, that he too would be charged with this offense, and again we advised him that he didn't have to make any statement unless he wanted to.

MR. SIDMAN: I have no further questions, Your Honor.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. LIFF:

Q. Detective Rogers, now you stated that you advised him that he had been identified as the person who had attempted to hold up the High's store that day? A. That is right, sir.

Q. When you came upon the scene, you took him from another officer, is that correct? A. No, sir, I did not.

Q. When did he come into your custody? A. When he was brought to No. 14 Precinct by Officer Olds and Thomas Young.

Q. Then you had no knowledge, of your own knowledge, as to
143 what had occurred prior to that time? A. Only what was told me by Officer Olds.

Q. Well, then the answer to my question that you had no knowledge of your own is, Yes, I presume? A. No, sir.

Q. Then you had personal knowledge of what had occurred at the scene. A. I heard a robbery, an attempted robbery called to go over there on the radio despatcher, by the radio despatcher, and I responded to the scene.

Officer Olds had the defendant. Officer Olds told me that this man had been identified.

MR. LIFF: Your Honor, I object to this and ask that it be stricken.

THE COURT: All right.

MR. LIFF: I ask that my question be answered.

THE COURT: Ask the question again.

BY MR. LIFF:

Q. Now, Detective Rogers, is it not true that of your own knowledge you had no knowledge of what had occurred in the store, that is, after the officers took Mr. Drew into the store. A. I can only say what Officer Olds told me. I had no knowledge from the complainant, Mrs. Hughes.

MR. LIFF: Your Honor, I ask the answer be stricken and he be
144 directed to answer the question.

THE COURT: All right. Let us proceed.

You had no personal knowledge?

THE WITNESS: No personal knowledge.

THE COURT: All right, he has answered the question. Let us proceed.

BY MR. LIFF:

Q. Now, then, when you told him at the police station that he had been identified, you didn't know that that was so of your own knowledge? A. That is right, sir.

Q. And you and Detective Chaplin took him into a questioning room? A. No, sir.

Q. You took him into a room where the lineup was? A. That is right, sir, our office.

Q. And at that time you advised him of his rights? A. That is right.

Q. And at that time he made a statement to you? A. At that time?

Q. Yes. A. No, sir.

Q. That was not the time? A. No, sir.

Q. How many men appeared in the lineup? A. Five, including
145 the defendant.

Q. Were these people in the lineup of the same build and height as the defendant? A. I would say so, yes.

Q. They were not of varying heights? A. Well, we got them as close to the height of the defendant as we possibly could.

Q. They approximated him, then? A. That is right.

Q. And it is not true, it would not be true that they were of varying and different heights? A. There would be some variation, yes, sir.

Q. But not considerable? A. That is right. It would be no 6 foot 5 in the lineup.

Q. How tall is the defendant? A. I would say five-eight, five-ten.

Q. Would there be any six foot two? A. I don't believe so, no, sir.

Q. Would there be any six foot one? A. I don't believe so, no, sir.

Q. Would there be any five foot nine? A. There could have been, yes, sir.

Q. About that variation, but not considerable? A. I would say so, yes, sir.

146 Q. And you warned him very carefully about his constitutional rights? A. I don't know what you consider very carefully.

Q. Well, what do you consider very carefully?

THE COURT: That is a conclusion of his. The jury must decide what they consider to be a sufficient warning.

He can say what he did, but whether he considered that a sufficient warning or not is immaterial.

BY MR. LIFF:

Q. Did you advise him of his right to have counsel? A. I don't recall whether I did or not, no, sir.

Q. Will you try to think hard whether you did or not and tell us whether --

THE COURT: He said he doesn't recall. I don't know what else he can say. I don't think he has to think hard.

Do you remember or not?

THE WITNESS: I don't recall.

THE COURT: All right, then let us proceed.

BY MR. LIFF:

Q. You would not say that it was untrue that you did not advise him of that right? A. No, sir.

Q. Did you at that time tell him or ask him to apologize to the lady? A. At that time?

147 Q. Yes. A. No, sir.

Q. You didn't? A. No, sir.

Q. Did Detective Chaplin ask him to apologize? A. At that time?

Q. At any time. A. Yes, sir.

Q. And did he refuse? A. He did, sir.

Q. And despite the refusal he confessed, as you say he did? A. He did.

Q. Did you ask him to put this confession in writing? A. I did not, sir.

Q. Do your procedures call for you to do this? A. Pardon?

Q. Do your police procedures call for you to get a written confession? A. When we can, yes, sir.

Q. And did you ask him to put it in writing? A. I did not.

Q. Despite the fact that your police procedures call for you to attempt to get a written confession, you did not? A. That is exactly

148 right.

Q. And you were content to take an oral confession and let it rest there? A. It wasn't my contention, it was the defendant's.

Q. You just told us that you did not attempt to get a written confession, am I right in that? A. The defendant told me it would be no need to put it in writing because when we came to Court he would have to deny it.

Q. Did you call in a stenographer? A. We do not have a stenographer.

Q. Did you call in anybody to write it down? A. I did not.

Q. Did you ask him to write it down? A. I did not.

Q. And you made no attempt to have it written? A. That is exactly right.

THE COURT: He has already answered that more than once.

BY MR. LIFF:

Q. Did you tell the defendant that if he made a statement, he didn't have to worry about it, that he was protected by what you call the Mallory rule? A. No, sir. The time we had this defendant, the Mallory decision would not even have been in effect.

149 Q. It would not? A. That is right.

Q. You deny that you said that? A. Yes, sir, I do.

MR. LIFF: That is all I have, Your Honor.

THE COURT: All right, you may step down.

(The witness was excused.)

MR. SIDMAN: Call Officer Williams.

THE COURT: I think you better keep the officer available.

Thereupon

JESSE B. WILLIAMS

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SIDMAN:

Q. Will you tell us your name and duty assignment, please?

A. Private Jesse B. Williams, assigned to the 14th Precinct.

Q. Were you so assigned on August 13, 1962? A. Yes, sir.

Q. What was your assignment on August 13th? A. On August 13th I was riding in Scout 143, working 4 to 12.

150 Q. As a result of information received, did you report to the vicinity, or drive your car to the vicinity of 5119 Grant Street, Northeast? A. Yes, sir.

Q. For what purpose? Why did you go there? A. Because there was a robbery at 5119. I was passing there and they gave a lookout for the person who was involved.

Q. Was the description of the person involved given?

A. Yes, sir, it was.

Q. Did you see anyone who matched that description?

A. Yes, sir, I did.

Q. Now, approximately how far from 5119 Grant Street was that? A. About 25 yards, sir.

Q. Now, was a description of the clothing of the alleged robber given in the lookout? A. Yes, sir, it was.

MR. LIFF: I object to the information that passed through the Police Department.

THE COURT: Well, I will overrule the objection.

BY MR. SIDMAN:

Q. Did you see anyone who matched that description of clothing?

A. Yes, sir, I did.

Q. Did you approach that person? A. Yes, sir, I did.

151 Q. Did you have a conversation with that person? A. I did, sir.

Q. What was that conversation? A. The person said he was coming from his girl friend's house.

Q. Was this in response to a question of yours? A. Yes, sir, it was.

I asked him what was he doing, what was he doing at this time, and he said he was coming from his girl friend's house.

Q. What was your reaction, did you believe this? A. No, I didn't.

MR. LIFF: I object, Your Honor.

THE COURT: No, it is not a question whether he believed it. He may state what he observed about the defendant.

BY MR. SIDMAN:

Q. What did you observe about the defendant's condition? A. Well, he had his hat off, and he was perspiring at the time.

Q. What did you then do if anything. A. I asked him would he go back to the --

THE COURT: The jury will disregard the question as to

152 whether he believed him. That is not material to the issue. He may describe his condition.

THE WITNESS: I asked the defendant would he go with me back to the High's ice cream store, where a robbery had occurred.

BY MR. SIDMAN:

Q. Did you encounter another police officer? A. Yes, sir, I did.

Q. Who was that? A. Officer Olds, in front of the ice cream store.

Q. What did you do with the defendant? A. I told Officer Olds the defendant fit the description.

BY THE COURT:

Q. Was the defendant there? A. Yes, the defendant was there.

THE COURT: This took place in the presence of the defendant. It is up to the jury to believe whether it took place or not. Any conversation that was had in the presence of the defendant is admissible. The jury has the right, of course, to disbelieve it or believe it.

BY MR. SIDMAN:

Q. What was that conversation? A. I told Officer Olds, this defendant fits the description I received over the radio, and I then turned him over to Officer Olds and proceeded because I had another run to answer.

153 Q. And you left? A. Yes, I did.

Q. Now, the man that you apprehended in the street, do you see him in the Courtroom today? A. Yes, sir.

Q. Will you point to him and describe what he is wearing? A. He is right there, and he is wearing a brown suit with a yellow shirt.

MR. SIDMAN: May the record reflect he has identified the defendant?

THE COURT: The record may so show.

MR. SIDMAN: I have no further questions, Your Honor.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. LIFF:

Q. Officer Williams, this day was August 13th? A. Yes, sir, it was.

Q. In the middle of the summer? A. I would say it was in the summertime, yes, sir.

Q. Is there any question in your mind about August 13th being in the summertime?

THE COURT: Well, that is something I think the Court can
154 take judicial notice of, it was in August, if it was in August.

BY MR. LIFF:

Q. Well, it was a hot day, wasn't it, officer? A. I would say it was getting along in the evening. I wouldn't say it was real hot.

Q. Is it unusual for people to perspire in August? A. Well, at that time in the evening I would say it was.

Q. You don't? A. Pardon?

Q. You don't? A. Well, I perspire very often, but I wasn't perspiring then.

Q. You were riding in a car? A. Yes, sir, and it was very hot in the car.

Q. The windows were open? A. Yes, sir.

Q. You were answering a call to an accident? A. Yes, sir.

Q. Going fairly rapidly, I take it? A. No, sir.

Q. Now, when you first observed the defendant -- when did you first observe him, when did you first see him? A. Well, as I was coming up Grant Street, he was coming down.

155 Q. It was some distance away from him that you saw him? A. Yes, sir.

Q. About how far, a block? A. I would not say that far.

Q. How far would you say? A. Well, 25 to 50 feet, something like that.

Q. 25 to 50 feet away when you first saw him? A. Yes, sir.

Q. And did you pull over to the curb alongside of him? A. I didn't pull up to the curb alongside him. There was another car between. It was cars parked at the curb.

Q. And he was walking along the street. A. Yes, sir.

Q. Hat in hand? A. Yes, sir, hat in hand.

Q. He was walking normally? A. Yes, about normal.

Q. And he was then about how far from the High's store? A. About 25 yards.

Q. About 25 yards? A. Yes, sir.

Q. That would be approximately 25 paces, steps, wouldn't it?

156 A. I would say so, yes.

Q. Man's size steps? A. Yes, sir.

Q. And he was walking normally? A. Yes, sir.

Q. With his hat in his hand? A. When I saw him, yes.

Q. On a summer evening? A. Yes.

Q. He didn't try to evade you, did he? A. No.

Q. He didn't break into a run when you came up? A. No.

Q. You didn't have to hold on to him to keep him there? A. Well, I went up to him and asked him what he was doing?

Q. Did you put your hands on him? A. No, I didn't have to.

Q. You didn't touch him? A. No, he came back to the store.

Q. You said, would you mind coming back to the store? A. Yes, sir.

Q. And so you both turned around, side by side, and walked back to the store? A. No, he was a little bit in front of me.

157 Q. A little in front of you? A. Yes.

Q. And he made no attempt to break away? A. No.

Q. He wasn't panting? A. No, I didn't notice he was.

Q. The only thing abnormal about this man on August 13th at 5:40 in the evening was that he was perspiring and had his hat in his hand? A. No, I said he fitted the description that we got.

Q. Well, he is not an abnormal looking person, is he?

THE COURT: What do you mean by abnormal? I don't understand.

MR. LIFF: Well, I said, the only thing abnormal about him was that, and he said he, he fitted the description, and I assume that is abnormal.

THE COURT: Well, let him say what he knows.

BY MR. LIFF:

Q. Well, was this an abnormal or a normal kind of description? A. No, it wasn't. It was a description they gave over the radio.

Q. And so the only thing, if he hadn't been described, the only thing that was not normal about what he was doing was that he was

158 perspiring on August 13th at 5:40 in the evening and had his hat in his hand? Is this correct? A. I don't quite get the question, sir.

Q. Except for the fact he was perspiring, he was just like any other person you might expect to find on the street? A. Yes, sir.

Q. That is the only thing that was wrong with him, that he was perspiring? A. Yes, sir.

Q. And had his hat in his hand? A. Yes, sir.

Q. And he told you he was coming from his girl friend's house? A. Yes, sir.

Q. So you asked him to go back to the store and you turned him over to Officer Olds? A. Yes, sir.

Q. Now, where was it that you turned him over to Officer Olds? A. In front of the ice cream store, 5119 Grant Street.

Q. Now, from the time that you accosted him, addressed him on the sidewalk, to the time that you took him back to the front of the store where Officer Olds was, how long a time had elapsed, total elapsed time? A. From the time I first talked to him?

159 Q. From the time when you first accosted him, to the time you went back? A. About one minute, I would say.

Q. About one minute? A. About that, yes, sir.

Q. And that is all? A. That is all.

Q. And you turned him over to Officer Olds? A. Yes, sir.

Q. Now, did you wait to see what Officer Olds did? A. No, sir, I didn't.

Q. You left immediately without observing anything further? A. Well, Officer Olds and his partner was there on the scene then, and I left him.

Q. And this was directly in front of the store? A. Yes.

Q. In the doorway of the store? A. It was in front of the store.

Q. Was it in the doorway? A. No, sir, it was --

Q. How far from the showcase? A. Well -- the showcase?

Q. Well, the window in front of the -- the show window in front

160 of the store? A. I would say about three or four feet, something like that.

Q. Three or four feet? A. Yes, sir. Right at the door.

MR. LIFF: That is all, Your Honor.

THE COURT: You may step down.

(The witness was excused.)

MR. LIFF: This officer will be kept here, Your Honor?

THE COURT: I don't know. Wait a minute. Do you need this officer any more? Are you going to call him?

MR. DISMAN: May we approach the bench, Your Honor?

(Thereupon counsel approached the bench and the following occurred:)

MR. SIDMAN: Your Honor, these officers are investigating a homicide and they have been up for 48 hours, and Detective Rogers got four hours sleep in the last 48 hours. If you need these officers, we will keep them, we have to, but you should let us know whether you need them or not.

THE COURT: How much more do you have to offer?

MR. SIDMAN: I have officer Olds and this one woman that walked out of the store.

THE COURT: Some woman that walked out of the store?

161 MR. SIDMAN: She cannot identify him, but I want to show that she is here.

THE COURT: How much evidence do you have?

MR. LIFF: I have to have an opportunity to confer with my client, but I think there will be only two witnesses.

THE COURT: Well, you should be able to decide before 12 o'clock whether you need these witnesses.

MR. LIFF: Yes, sir, Your Honor.

There is a conflict, according to the defendant's story, as to what happened, and I am trying to discover the facts myself. There is a conflict in his description of what happened.

THE COURT: Well, do you want the witness that just left the stand?

MR. LIFF: I would like to have Officer Rogers here.

THE COURT: All right, let us keep him here.

MR. LIFF: I don't think it is necessary to keep Williams.

THE COURT: Excuse Williams and tell Mr. Rogers we will try to get rid of him as soon as we can.

(Thereupon counsel resumed their places in the Courtroom and the following occurred:)

THE COURT: Call your next witness.

Mr. Williams may be excused.

162 MR. SIDMAN: Call Vernice Ross.

Thereupon

VERNICE ROSS

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

MR. LIFF: May we approach the bench, Your Honor?

(Thereupon counsel approached the bench and the following occurred:)

MR. LIFF: It was my understanding that Detective Chaplin was going to be made available to us. That is what you said yesterday and you tendered him, and he was to be available here.

MR. SIDMAN: What led you to believe to the contrary?

THE COURT: Well, is he here?

MR. SIDMAN: Yes, sir.

MR. LIFF: Oh, I thought he said he had only this one witness.

THE COURT: All right, let us proceed now.

(Thereupon counsel resumed their places in the courtroom and the following occurred:)

DIRECT EXAMINATION

BY MR. SIDMAN:

Q. Mrs. Ross, will you speak about six inches from the microphone and loudly so that we can all hear you.

163 Will you state your full name, please? A. Vernice Ross.

Q. Where do you live? A. 5220 Foot Street, Northeast.

Q. I want to direct your attention back to August 13, 1962.

Now, are you familiar with a High's store at the address 5119 Grant Street? A. Yes, I am.

Q. Do you frequent that store? A. I do.

Q. Now, on August 13, 1962, in the afternoon, the late afternoon hours, did you have occasion to enter the store? A. Yes, I was coming home from work that evening, and I stopped in the store to get some ice cream to take home.

Q. Now, I want you to tell me what happened as you entered the store, but don't tell me what anybody said. Will you do that? A. Yes.

THE COURT: Just what you saw.

THE WITNESS: Well, as I was going in the store, a man came out, but I didn't pay any attention, I thought it was a customer.

164 BY MR. SIDMAN:

Q. Do you know who was in the store after this man left?

A. It was the girl that worked in the store and she was at the phone.

Q. Do you know her name? A. I just learned her name by seeing her here, Mrs. Hughes.

Q. Could you identify the man who left the store? A. No, I could not.

MR. SIDMAN: All right. I have no further questions, Your Honor.

THE COURT: You may cross examine.

MR. LIFF: I have no questions, Your Honor.

THE COURT: All right, you may be excused.

Is there any further need for this witness?

MR. SIDMAN: No, sir.

THE COURT: You may be excused.

(The witness was excused.)

MR. SIDMAN: Call Officer Olds.

Thereupon

DANIEL R. OLDS

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

165 DIRECT EXAMINATION

BY MR. SIDMAN:

Q. Officer, will you state your full name and assignment, please? A. Daniel R. Olds, right now with the Prince Georges County Police Department.

Q. And what was your occupation on August 13, 1962? A. I was a private in the Metropolitan Police Department, Washington, D.C.

Q. What precinct? A. No. 14.

Q. Were you working, were you on duty on August 13, 1962? A. Yes, sir.

Q. Do you recall the shift that you worked? A. 4 to 12, sir.

Q. Were you in a scout car? A. Yes, sir, 141.

Q. Officer, as a result of information received, did you report to the vicinity of 5119 Grant Street, Northeast? A. Yes, sir.

Q. For what purpose? A. For an attempted robbery that we received over the car radio.

Q. Now, when you approached the vicinity, what did you observe

166 in the vicinity of this store? What did you observe? A. Well, I observed the other two officers with the defendant.

Q. What other two officers? A. E.A. Walters and Williams.

Q. That is Private Williams that you have seen in the building? A. Yes, sir.

Q. What happened? A. We arrived there, and they turned him over to me, and I took him in the store, where he was identified by the complainant.

Q. The complainant, who? A. Mrs. Hughes.

Q. What did she say? A. When I brought him in there --

MR. LIFF: I object.

THE COURT: Just a minute. Do you object to what she said?

MR. LIFF: Yes.

THE COURT: Was the defendant present at that time?

THE WITNESS: Yes.

THE COURT: The defendant, when she said something?

THE WITNESS: Yes, sir.

THE COURT: The objection is overruled.

167 BY MR. SIDMAN:

Q. Do you recall her words? A. She said she wasn't sure, that he was wearing glasses, and I asked him to put on his glasses, and she said: That is him.

Q. Sunglasses? A. Yes, sir.

Q. What did you do with the defendant then? A. I took him to No. 14 and booked him.

MR. SIDMAN: I have nothing further, Your Honor.

CROSS EXAMINATION

BY MR. LIFF:

Q. Officer Olds, can you describe the scene as you recall it when you came upon it, tell us where the store is, where the defendant was, and where the policemen were? A. Well, we pulled up almost in front of the store. We pulled up next to the other two officers that had him, and to the best of my memory, we were not quite in front of the store.

Q. You parked right in front of the store? A. Not quite in front, and we took him in, I went in first, and --

Q. I am asking you to describe what the scene was before you took him in?

Where were the other officers? A. The best I remember, they
168 were just about in front of the store.

Q. Just about in front of the store? A. Yes, that is right.

Q. Were they talking to the defendant there? A. I don't remember.

Q. There were two officers with him, is that correct? A. Yes, sir.

Q. Two officers? A. Yes, sir.

Q. Both Officer Williams and Officer Walters? A. Yes, sir.

Q. Were on the sidewalk talking to him? A. I don't know if they were talking to him or not.

Q. I beg your pardon? A. I don't know if they were talking to him or not.

Q. But both officers were there? A. Yes, sir.

Q. Now, do you know if they are assigned to a scout car? A. One was assigned, the other was a relief.

Q. Were they in a scout car that day, do you know? A. Yes, sir.

Q. And their scout car was parked somewhere else?

A. Yes, sir.

169 Q. Now, Officer, if I understand you correctly, Officer Williams and Officer Walters were on the sidewalk somewhere in the vicinity of the store, and they had with them the defendant? A. Yes, sir.

Q. Now, you are certain of that?

MR. SIDMAN: Objection, Your Honor.

THE COURT: The objection is overruled. I will let him answer that one time, please don't ask it again.

BY MR. LIFF:

Q. You are certain of that, Officer? A. Yes, sir.

Q. Now, can you tell us where with respect to the store they were standing, were they 25 yards away from the store or were they more immediately in front of the store, or just a little bit from you, and tell us the best recollection you have? A. To the best of my mind, they weren't exactly in front of the store, and I would say probably 20 yards from the store.

Q. They were 20 yards from the store? A. Yes.

Q. And you went over then? A. Yes.

Q. And at that point, 20 yards from the store, they turned him

170 over to you? A. Yes, sir.

Q. And then you took him back to the store? A. Yes, sir.

Q. And of this you are sure? A. Yes, sir.

Q. Now, when you took him in the store, who was in the store?

A. Mrs. Hughes, and my partner, Private Young, and Mrs. Ross.

Q. And Mrs. Ross? A. I am not sure about anybody else.

Q. You took her back in the store? A. Who?

Q. Mrs. Ross. A. No, sir.

Q. She was in the store? A. I believe so. I know she was there when I took him to the counter.

Q. Now, at that time you asked Mrs. Hughes to identify him?

A. Yes, sir.

Q. And she said she could not? A. No, sir, she said she wasn't sure, that he was wearing glasses.

171 Q. And without the glasses she could not identify him?

MR. SIDMAN: Objection, Your Honor. That is a conclusion of the lawyer.

THE COURT: Now counsel, as you know, on cross examination lawyers are permitted to ask leading questions.

However, as I shall tell the jury later, the questions propounded to the witness are not the evidence in the case. The evidence is what the witnesses say in answer to the question.

All right, you may proceed.

BY MR. LIFF:

Q. And without the glasses she could not identify him; is that correct? A. No, sir, she said she wasn't sure. She said it looked like him, he was wearing dark glasses.

Q. Then when he put on dark glasses she identified him.

A. Yes, sir.

Q. But without the glasses she wasn't sure? A. Yes, sir.

Q. And this uncertainty was immediately after the event, that is, the same day, just after you received the call? A. Yes, sir.

172 Q. And at this time she had this uncertainty without glasses?

A. Yes, sir.

Q. Now, who else was in the store at the time? A. To the best of my knowledge, my partner, Private Young, and Mrs. Ross.

Q. And then what -- I am sorry. Have you finished?

A. Well, the best I can remember, I believe there was somebody working there that day, she was in the back when all this happened, and I believe she came out, I am not sure.

Q. Somebody working in the store? A. I believe so, I am not sure.

Q. And she came out?

MR. SIDMAN: Objection, Your Honor. This is turning on a speculation.

THE COURT: Do you object? Let me say this to counsel, and you might just as well understand this. Any time you object, you do not have to give the reason for it, unless I ask you for it.

All right, the objection is overruled, let us proceed.

BY MR. LIFF:

Q. Will you answer my question? A. I might be mixed up with the other High's store, I am not sure.

173 Q. You might be mixed up with the other High's store? A. Yes, sir.

Q. Are you mixed up with the other High's store about anything else? A. No, sir.

Q. Are you sure of everything else, but you are not sure of that? A. Yes.

Q. Can you recall now whether there was anybody else working in the store at that time? A. I am not sure.

Q. Who else was there? Is that all now? A. As far as I can remember.

Q. And then you took the defendant to the precinct? A. Yes, sir.

Q. And what did you do with him there? A. Booked him and brought him upstairs.

Q. To whom did you turn him over? A. To Detectives Rogers and Chaplin.

Q. Now, that was the first time you saw Detective Rogers at that time in connection with this High's store? A. As far as I can remember.

Q. At the precinct station? A. Yes, sir.

Q. And you did not turn the defendant over to Detective Rogers

174 until you got to the precinct? A. Yes, sir.

Q. This you are testifying to? A. Yes, sir.

Q. That is correct? A. Yes, sir.

Q. Do you have any notes at all with you concerning these events? A. No, sir.

Q. Did you make any notes concerning these events?

A. No, sir. The only notes I did make was the date and the time, that is all.

Q. Did you take part in the booking? A. What do you mean by that?

Q. Well, did you have anything to do with giving the information for the booking, etcetera? A. No, sir.

Q. You just turned him over to -- did Detective Rogers get the information from you at that time at the station house? A. No, sir.

Q. You just simply handed him over? A. I took him upstairs and went upstairs with him.

Q. And just turned him over, without making any statement, without giving him any records? A. I did say that Mrs. Hughes
175 identified him at the store, that is all I did say.

Q. That is what you told him at the station? A. Yes.

Q. You did not tell him that in the store? A. I don't remember telling him in the store.

MR. LIFF: That is all I have, Your Honor.

MR. SIDMAN: I have no further questions.

THE COURT: Is there any reason why the witness cannot be excused.

MR. SIDMAN: I don't want him.

THE COURT: All right, he may be excused.

(The witness was excused.)

MR. SIDMAN: Your Honor, may I move Government Exhibit 1 for identification into evidence?

THE COURT: It may be received.

Any objection to it?

MR. SIDMAN: That is the seal of the corporation.

THE COURT: Any objection?

MR. LIFF: No, sir.

THE COURT: It may be received.

(The article previously marked for identification as Government Exhibit No. 1 was received in evidence.)

MR. SIDMAN: The Government rests, Your Honor.

THE COURT: Are you ready to proceed?

176 MR. LIFF: Yes, sir.

THE COURT: All right, we will take a ten-minute recess at this time.

(Thereupon a short recess was had.)

THE COURT: Are you ready?

MR. LIFF: Yes, Your Honor.

THE COURT: All right, Mr. Liff, you may proceed.

MR. LIFF: I will call Theresa Powell.

Thereupon

THERESA POWELL

was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LIFF:

Q. Will you state your full name to the Court and jury?

A. Theresa Powell.

THE COURT: Now, I want you to listen carefully to the questions that will be put to you by counsel, by the attorney, and wait until he has finished his question before you start to answer, and then give any answer you wish to give.

BY MR. LIFF:

Q. Will you state your full name and address, please?

A. My name is Theresa Powell, 712 Girard St. Northwest.

177 Q. State your address again? A. 712 Girard Street, Northwest.

Q. Mrs. Powell, I want to take you back to the date of July 27th. Do you remember that date? A. Yes, sir.

Q. Of this year? A. Yes, sir, I do.

Q. Will you tell us, please, how it is that that date is remembered by you? How come that you remember that date? A. Well, that is the day that Nathan Drew came to my house and rented a room.

Q. Now, is there anything other than that that fixes that date in your memory, with any other event that fixes that date in your memory? A. Well, I say I know it is that day because the 20th of that same month we just returned from North Carolina from a funeral for my niece, and it is that same Friday he came to my house.

Q. Well, now, how do you recall that it was a Friday? A. Well, Friday is my husband's pay day, and when he came home from work he said Nathan was coming.

Q. Now, did Nathan come to your house that day? A. Yes.

Q. And did he move into your house that day? A. Yes.

178 Q. And at about what time? A. Well, he came about between 2 and 2:30.

Q. When did your husband come home from work? A. He got home about 4.

Q. How long did Nathan stay at your house? A. Well, when he came, he asked me about the room, and I told him he would have to wait until my husband got home, and he stayed there with me until my husband came home.

Q. Did he stay there after that? A. Yes.

Q. Until what time in the evening? A. Until about 7.

Q. Now, this is on August 13th -- that is, on July 27, 1962? A. Yes, sir.

Q. That is right? A. Yes, sir.

Q. You testify that Nathan Drew --

THE COURT: Wait a minute, counsel. I cannot permit you to summarize what you think the witness has already stated.

You may ask a question and she may give her answer. I never allow counsel to repeat what you think the witness has stated. That is what the jury is here for, to remember the evidence. And it just takes up added time.

179 MR. LIFF: Yes, Your Honor, I apologize.

BY MR. LIFF:

Q. Now, will you state whether you see Mr. Drew in this room? A. Yes, sir, I do.

Q. Where is he? A. Right there. (Indicating)

Q. Will you describe how he is dressed? A. He has a brown sport jacket on.

Q. And that is the man about whom you have just testified? A. Yes.

Q. Did you know Mr. Drew before that? A. Yes, I did.

Q. And he came to your house for the purpose of -- will you state why? A. Of renting a room.

THE COURT: I cannot hear you.

THE WITNESS: Of renting a room.

THE COURT: Renting a room?

THE WITNESS: Yes, sir.

BY MR. LIFF:

Q. And did he live at your house for any period of time from that time on? A. Yes. Before this?

180 Q. No, from July 27th on? A. Yes, about, I guess about three weeks.

Q. About three weeks he lived at your house? A. Yes.

Q. Now, will you tell us again, if you please --

MR. SIDMAN: Objection, Your Honor.

THE COURT: I don't know what the question is yet.

BY MR. LIFF:

Q. Will you tell us what time in the evening he left your house? A. Well, I am pretty sure it was 7 o'clock. Well, at 7 o'clock my husband and I and my kids went to my mother's house that evening, and he left about the same time we did, 7 o'clock.

Q. And where do you live? A. 712 Girard Street, Northwest.

Q. What was that? I didn't quite catch it. A. 712 Girard Street, Northwest.

Q. Northwest? A. Yes.

Q. And that is a considerable distance --

MR. SIDMAN: Objection, Your Honor.

THE COURT: Let me hear the question first.

MR. LIFF: I will withdraw the question.

THE COURT: I don't know what he is going to say. You
181 interrupt him right in the middle of a question.

MR. LIFF: Well, I will withdraw the question, Your Honor. That is all I have.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. SIDMAN:

Q. When did you first learn about Nathan Drew's arrest?

A. When did I first learn about it?

Q. Yes, when did you first learn about Nathan Drew's arrest?

A. Oh, well, I heard from a friend of mine -- no, the first I heard, his brother came to the house, to see if he had any clothes left there.

Q. Whose brother? A. I don't know his brother. He said he was his brother when he came to the house.

Q. Well, who is this friend that you just mentioned? A. That was after I heard it from his brother, a friend of his up the street from where I live at.

Q. His brother? A. No, his brother was the first one that mentioned it to me.

Q. When did you first meet Nathan Drew? A. Well, I first met
182 him, I guess, some time last year, when my husband's cousin came to my house.

Q. What is your husband's cousin's name? A. Willard Lawson.

Q. What happened at that time? A. Well, he came there and he stayed there, I guess, about a month, about two months, and he left. That was last year.

Q. What month? A. Well, I don't exactly remember the month.

Q. You don't remember what month? A. Of that year.

Q. Last year? A. Yes. The first part of the year.

Q. Do you take in many roomers? A. No, sir.

Q. Five, ten, fifteen, how many? A. Well, I don't usually have roomers, but only I rented to him because he was a friend of my husband's cousin.

Q. He was the only roomer you had? A. Other than my husband's cousin.

Q. Last year? A. Other than Willard Lawson, yes.

Q. Now, let us talk about that July 27th.

Now, who was home in the morning of July 27th of this year?

183 A. I was.

Q. And anybody else? A. Me, except my kids.

Q. Do you have a house? A. No, I have an apartment.

Q. How many rooms in your apartment? A. I have three bedrooms, living room, kitchen, and bath.

Q. How many children? A. I have three children.

Q. Now, you and your husband are in one bedroom? A. Yes.

Q. And where are the children? A. In another bedroom.

Q. All three in one bedroom? A. Three girls, yes.

Q. And what about that third bedroom, what do you use that for? A. Well, we have never used it for a bedroom, just an extra room, until I rented it to my husband's cousin.

Q. To your husband's cousin? A. And then I did.

Q. Did you have a bed in that room? A. No, I put the bed up.

184 Q. You put a bed up?

MR. LIFF: I object to the summarization, Your Honor.

THE COURT: The objection is overruled.

BY MR. SIDMAN:

Q. Now, where was the other bed that you put up? Where did you keep that when you didn't have it up? A. Well, mostly in the closet.

Q. In the closet? A. Yes.

Q. What kind of bed is it? A. It is a small folding bed.

Q. A folding bed? A. Yes.

Q. How old are your children? A. Well, my oldest one is five, and one four, and one two.

Q. And how long have you lived in this apartment? A. About a year and a half now.

Q. How much rent do you charge when you have a roomer? A. Well, I never usually have a roomer, but I was charging just a couple of dollars a week.

Q. Who is that? A. Nathan Drew and Willard Dawson.

Q. Well, were they living there together? A. Yes.

185 Q. Did they both come together on July 27th? A. No.

Q. Well, were they living together in 1961? A. In '61, yes.

Q. Now, where was your husband on the morning of July 27th? A. Working.

Q. What did you do in the morning? A. What did I do in the morning?

Q. Yes. A. Well, when I get up, I guess I feed my kids, and dress them, and do my housework I have to do.

Q. Now, then the kids were home? A. Yes.

Q. And then what happened, was there a knock on the door? A. Well, about two o'clock yes, Nathan came to the door, and I opened the door for him, and he comes in.

Q. What happened then? A. Well, then is when he asked me for the room, and I told him he would have to wait until my husband comes home, and he sit there and he talked --

Q. Did he tell you where --

THE COURT: Let her finish the statement. Have you finished

186 the statement?

THE WITNESS: Yes, sir.

BY MR. SIDMAN:

Q. Did he tell you where he had come from? A. No.

Q. Did you ask him? A. No, I didn't.

Q. When was the last time you had seen him? A. Well, it had been, I guess, up until that time, about seven months, I guess.

Q. Seven months? A. Yes.

Q. And he came in and asked for a room, and you didn't ask where he had been; is that correct? A. No, I didn't.

Q. What happened? He sat down in your living room; is that right? A. Yes.

Q. What happened then? A. Well, he sat and talked with me, and my husband came home, and he had moved some furniture around in the meantime.

Q. What did you talk about? A. I don't recall. I can't remember that.

He didn't have too much to say, and he asked me about how was
187 my kids, and he asked about my husband's cousin, Willard Lawson, and stuff like that.

Q. What happened then? A. Well, when my husband came home we had decided to change the bedroom around, and he and my husband changed the bedroom around.

Q. What was the change in the bedroom? A. Well, just changed the bed from one position to the other.

Q. This was in your bedroom? A. Yes, in my bedrooom.

Q. What happened then? A. Well, after they discussed about the room, we went back and got the other bed he could sleep on.

Q. Where was that bed located? A. In the back room.

Q. I thought it was in the closet? A. The bed was in the closet, yes.

Q. It was taken out and put in the back room? A. Yes.

Q. And who did that? A. My husband and Nathan Drew.

Q. What happened then? A. Well, then my husband went to the store to get some beer, and we sat down and started drinking until seven o'clock, and we left for my mother's house.

188 Q. Now, who went to your mother's house? A. My husband and I and my kids.

Q. And where did Nathan Drew go, if you know? A. Well, after that, I don't know.

Q. When was the next time you saw him? A. Well, when we got back home that night, he was there.

Q. Did he move in? A. Yes.

Q. Now, how often do you go to your mother's house? A. Well, I go to my mother's house as much as I could. I lost my mother a couple of months ago.

Q. When did this fellow come over to your house and pick up the belongings of Nathan Drew? A. Well, that was, I guess, about a month ago now, he came and said that he came to get Nathan's clothes, that Nathan was in jail.

Q. What day was that? A. That was after I got back from my mother's funeral in North Carolina, in September, I guess, about the 18th, I think.

Q. The 18th of September? A. Yes.

Q. Now, how long did Nathan stay at your apartment? A. Well,
189 approximately about three weeks.

Q. Three weeks? A. Yes.

Q. When did he pay his rent? A. Well, the first week he paid me on that Friday, and after that he didn't pay me any more. I think he lost his job.

Q. He paid you that Friday? A. Yes.

Q. Do you know what he was working at? Do you know if he was working? A. Well, he told me he was working, but I don't know for sure.

Q. Did he ever tell you where he had been before he came to your apartment on the 27th of July? A. No, I never asked him.

Q. You never asked him? A. No.

Q. Do you and your husband still live at 712 Girard Street? A. At the time, yes.

Q. At this time, now? A. Well, we live at 712 Girard, yes.

Q. And at that time you lived there too; is that correct?

190 A. Yes.

Q. Does he work during the day? A. Who, my husband?

Q. Yes. A. Yes.

Q. And he was working on the 27th of July? A. Yes.

Q. Now, on the afternoon of the 27th -- do you recall what kind of a day it was? A. Well, it seemed to be pretty hot that day.

Q. Now, at the time that Nathan came to the door, what were you doing? A. Well, I was cleaning up at the time.

Q. From a party or something? A. No, just I usually stays around a lot, and I was staying around when Nathan came to the house.

Q. When was the first time that you spoke to somebody about the events of July 27, 1962? A. Well, I spoke to Mr. Cole.

Q. When was that? A. Well, when he came to the house and asked me if I knew Nathan Drew, and I told him yes.

Q. When did he come to your house? A. Well, I don't know the exact date when he came to the house.

191 Q. Well, give me your best recollection. A. I think he came --

Q. Now, that must have been an important date.

THE COURT: Now, wait a minute, counsel. Do not argue with the witness.

MR. LIFF: I object.

THE COURT: Now, just a minute, counsel. Give the witness a chance to answer before you draw any conclusions.

MR. SIDMAN: Yes, sir.

BY THE COURT:

Q. What he wants to know is how long after July 27, 1962, was it that counsel came to your home. Do you understand the question? A. Yes.

THE COURT: How long after that occasion was it that the attorney came to your home?

Is that your question?

MR. SIDMAN: That is correct.

THE WITNESS: Well, it was quite a while after that.

BY THE COURT:

Q. Well, approximately how long? You don't have to be exact.

A. I think it was one day last month.

Q. One day last month? A. Yes, sir.

192 THE COURT: All right, you may proceed.

BY MR. SIDMAN:

Q. When this fellow came to pick up the clothing, in September, I believe you said, what did he tell you? A. He said he was Nathan's brother. I had never seen him before, but he said he was Nathan's brother, and he came for his clothes, and when I talked to him about the rent that Nathan owed me, he said he would pay, and Nathan had been in jail at the time.

Q. You are still owed some rental money, aren't you? A. Yes.

Q. Now, were you told anything about Nathan's arrest? A. No. By his brother?

Q. Yes. A. No, he just said he was in jail, and that he came for his clothes and he had to go to Court.

MR. LIFF: I object.

THE COURT: All right, the jury will disregard the statement that the witness said that someone told her that he was in jail. He is only being tried for these offenses. So dismiss that from your mind. I don't know if he was there or not. It doesn't make any difference.

BY MR. SIDMAN:

Q. When was the first time that you learned -- let me ask it

193 this way: Did this fellow who stated that he was the brother of the defendant tell you about the offenses for which Nathan Drew was under arrest? A. No.

MR. LIFF: I object.

BY MR. SIDMAN:

Q. He did not? A. No.

THE COURT: She has already answered.

BY MR. SIDMAN:

Q. When was the first time that you learned of the offenses? A. Well, I discussed it with a neighbor of mine, and she just heard about it or read about it in the paper, I guess.

Q. When was that? A. Well, that was the next day after his brother came to the house.

Q. When had she seen it in the paper? A. I don't know. I didn't ask her about that.

Q. Did she say she had seen it in the paper? A. Yes, because she knowed Nathan.

Q. And at that time you learned what Nathan was charged with? A. She said he had robbed, or tried to rob a High's store, I don't know exactly.

194 Q. Did you learn of the date? A. No, sir.

Q. Well, did you make any other inquiry about this arrest of Nathan Drew? A. No, it didn't make much difference, because he left my house, and I didn't know anything more about it.

Q. You spoke to, and I want to make sure this is correct, there are only two people that you spoke to about Nathan Drew's arrest and the charges against him prior to the time that the attorney for Drew came to see you?

MR. LIFF: I object, Your Honor. I think we have been all over this.

THE COURT: All right, the objection is overruled.

THE WITNESS: Yes.

MR. SIDMAN: I have nothing further, Your Honor.

THE COURT: Is that all?

MR. LIFF: Yes, sir.

THE COURT: Does either party want the witness? If not, we will excuse her.

(The witness was excused.)

THE COURT: Is there anything further?

MR. LIFF: I would like to recall Officer Rogers, Detective Rogers.

THE COURT: Very well.

195 Thereupon

CARLTON L. ROGERS

was recalled as a witness and, having been previously duly sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION

BY MR. LIFF:

Q. Detective Rogers, do you have in your hand records with respect to the events with which we are inquiring about today?

A. I have a statement of facts, yes, sir.

Q. May I have those, please? A. Yes.

MR. LIFF: Will the Court indulge me just a moment?

BY MR. LIFF:

Q. Now, Detective Rogers, you testified that you questioned the defendant at the precinct station house? A. That is right.

Q. And this was immediately after the lineup? A. Prior and after the lineup, yes, sir.

Q. Prior and after the lineup? A. Yes.

Q. And then when you were through questioning him, you made out reports; is that correct? A. That is correct.

Q. And that these are the reports that I hold in my hand?

196 A. Some of them, yes, sir.

Q. Now, and forgive me, and this was after the questioning?

A. That is correct.

Q. Now, I ask you to look at these reports and tell me whether the report reads as I read it.

THE COURT: Now, counsel, will you stand back, and let me ask you a question.

You have called Mr. Rogers to the stand. You cross examined him during the time he was a Government witness, and you have a right to call Mr. Rogers or anybody else. You have a right to ask him direct questions, but when you call a witness to the stand, as you know, you vouch for his credibility as a witness. You understand that?

MR. LIFF: Yes, sir.

THE COURT: So I understand that you are calling him now as your witness:

MR. LIFF: I thought I was recalling him, Your Honor.

THE COURT: No, you had an opportunity to cross examine him. Now, do you want to call him?

MR. LIFF: I will ask him one question, Your Honor.

197 THE COURT: You may ask him one question.

BY MR. LIFF:

Q. Does each of the records you have reflect a statement by the defendant? A. It does.

Q. And what statement is that? A. Defendant denies this offense.

Q. And that appears on both of those statements? A. That is correct, sir.

Q. And these statements were made after the questioning? A. That is correct, sir.

MR. LIFF: That is all I have, Your Honor.

CROSS EXAMINATION

BY MR. SIDMAN:

Q. Detective Rogers -- first I would like to have this marked for identification as Government Exhibit No. 2.

(The document was marked Government Exhibit No. 2 for identification.)

THE COURT: Let me see it first.

I would like to know the purpose of this. He only asked one question, didn't he?

MR. LIFF: Yes, sir, I did.

THE COURT: What is the purpose?

MR. SIDMAN: Shall I state it in open court?

198 THE COURT: Yes.

MR. LIFF: Well, Your Honor --

THE COURT: Suppose you come to the bench.

The jury will understand, of course, and you have probably been told this before, that when we have these whispered conferences, and I hope they are whispered, that we do it because we do not want the jury to hear what we are talking about, and we do it purposely. It is by reason of the fact that we don't want you to hear something that you should not hear.

If the Court feels you should hear anything, we will let you hear it. So don't draw any unfavorable inferences by reason of the fact that counsel asks for an opportunity to whisper to the Judge at the bench.

(Thereupon counsel approached the bench and the following occurred:)

MR. SIDMAN: The purpose is, this document is to show that following that in presenting this case at a hearing the forms here show when the admission was made by the defendant, and that is for this purpose.

THE COURT: That is the following day? The defendant admitted it and said he would deny the same thing in court.

You don't have to introduce this in evidence. You can ask him now. You brought out the fact that he denied the offense.

199 MR. LIFF: Yes, sir.

THE COURT: When was this?

MR. LIFF: At the time of the questioning.

THE COURT: You can ask if he later admitted it. Did he later talk to him?

MR. SIDMAN: Yes, and I want to ask him about this.

I want to introduce this.

THE COURT: All right.

(Thereupon counsel resumed their places in the courtroom and the following occurred:)

BY MR. SIDMAN:

Q. Detective Rogers, you testified here that the defendant at one time denied the offense? A. That is right.

Q. And a notation to that effect was made in the report?

A. That is right.

Q. Did the defendant thereafter admit to this offense?

A. He did.

Q. Was it after the lineup? A. That is right.

MR. LIFF: May I ask a question?

THE COURT: Now, wait a minute. How far are we going with this?

All right, I will let you ask a question.

200 REDIRECT EXAMINATION

BY MR. LIFF:

Q. Now, I submit to the Court this -- no, I withdraw it.

THE COURT: All right, go ahead and ask the question.

BY MR. LIFF:

Q. Did you just state that the admission was at a subsequent time, after you wrote this report to which we referred before? A. After the lineup.

Q. Now, are you testifying now, Officer Rogers, that this alleged oral admission was before or after the statement to which you testified before? A. Before this statement was typed up.

Q. And so this statement was written, typewritten after the time when you allege he orally confessed to you? A. That is correct.

Q. And you made no notation in that statement and report in your official line of duty; is that right? A. In this report?

Q. Yes. A. That is right, sir.

MR. LIFF: That is all I have.

THE COURT: Do you have another question?

MR. SIDMAN: Yes, sir.

201 THE COURT: All right, one question.

RECROSS EXAMINATION

BY MR. SIDMAN:

Q. Why did that report not contain the statement?

MR. LIFF: I object.

THE COURT: He can ask him that. That is a proper question. All right, let us proceed.

MR. LIFF: I object, Your Honor.

THE COURT: The objection is overruled.

BY MR. SIDMAN:

Q. Why did that report not contain the full statement --

THE COURT: Let's not have any discussion about it, counsel.

MR. SIDMAN: The satement of the defendant?

THE COURT: Just ask him why it wasn't in there?

THE WITNESS: It was an oral statement and need not be put in this statement of facts.

THE COURT: I think we have gone far enough on this.

What else do you have in mind?

MR. SIDMAN: May I address a question to the witness, Your Honor?

THE COURT: Yes.

BY MR. SIDMAN:

Q. Is there a specific form which you fill out in regard to oral
202 admissions or confessions made by defendants? A. It is.

Q. Did you fill out such a form? A. I did.

MR. LIFF: Your Honor --

THE COURT: You object?

MR. LIFF: I object.

THE COURT: All right, overruled. Let us proceed.

BY MR. SIDMAN:

Q. When did you fill out such a form? A. The following day.

Q. I show you what has been marked Government Exhibit No. 2 for identification, and is that the form? A. It is.

Q. Now, what is the statement made in there?

MR. LIFF: I object.

THE COURT: Well, you don't have to refer to the statement. You may state what the defendant said to you, if anything, the following day.

BY MR. SIDMAN:

Q. What did you state in your report the defendant said to you?

A. That the defendant admitted the attempt holdup, and the holdup of the High's at East Capitol Street, and that he would have to deny it when he came to court.

203 BY MR. LIFF:

Q. And that was the following day? A. That is correct, sir.

THE COURT: That is what he said.

MR. LIFF: That is all, Your Honor.

THE COURT: Now, step down, officer.

(The witness was excused.)

THE COURT: Is there anything further, counsel?

MR. LIFF: Of this witness, no.

I would like to call Detective Chaplin.

THE COURT: Now, Mr. Liff, I think you should understand this, and I don't want to repeat it again. When you call a witness to the stand, and I shall explain this to the jury in a few minutes -- have the witness stay out there a minute.

Now, when you call a witness to the stand, and let me explain this to the jury now, that any party, either the lawyer for the Government or for the defendant has the right to call any witness to the stand.

However, when a witness is produced for your consideration or called to the stand to testify, Mr. Liff in this case, who is calling Officer Chaplin, in effect states to the jury and the Court that I vouch for the credibility of this witness. I am calling him as my witness; I want you to believe his testimony.

204 Now, that is the effect of calling a witness to the stand.

Do you understand that, Mr. Liff?

MR. LIFF: Yes, Your Honor, I understand.

May I ask the Court for a recess at this time, so I can confer with my client?

THE COURT: So you can have an opportunity to confer with your client?

MR. LIFF: Yes, sir.

THE COURT: Haven't you had an opportunity to confer with him?

MR. LIFF: Your Honor, I have conferred with him many times, but I would like a further opportunity.

THE COURT: How much time do you need?

MR. LIFF: About five minutes, Your Honor.

THE COURT: All right, we will take a five-minute recess.

(Thereupon a short recess was had.)

(The jury was not in the courtroom.)

THE COURT: Are you ready?

MR. LIFF: The defendant is not going to call any more witnesses, Your Honor.

THE COURT: All right, do you rest your case?

MR. LIFF: I rest my case.

THE COURT: I understand the defendant is not going to take the stand?

205 MR. LIFF: Yes, sir.

THE COURT: Now, I want the defendant to listen carefully to what I am about to say, to listen to the Court, and the attorneys, too.

The defendant knows, and I suppose he has been informed by his counsel, that he does not have to take the stand and testify if he does not wish to do so.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And no presumption, of course, can be drawn or should be drawn by the jury from your failure to testify.

Now, during my charge I want the defendant through his counsel to tell me whether or not you wish me to tell the jury, or do you want me to tell the jury that the defendant, of course, has not testified, that he has elected to stand on his constitutional right, that he doesn't have to testify and doesn't have to prove his innocence, and doesn't have to prove anything, and that they are to draw no inference or no presumption whatsoever unfavorable to the defendant by his failure to take the stand, or words to that effect.

Do you want me to say that to the jury?

Now, you may confer with your lawyer first before you answer
206 that question. I will do whatever you desire to do.

MR. LIFF: Your Honor, he would like to have it.

THE COURT: He would like the Court to explain to the jury that the defendant does not have to take the stand?

MR. LIFF: Yes,sir.

THE COURT: All right, the Court will do that.

Now, how much time will each side need for argument?

How much time will you need, Mr. Sidman?

MR. SIDMAN: Your Honor, I would like thirty minutes.

THE COURT: Thirty minutes? I think that is too long for a case like this. How about fifteen minutes on each side? You should be able to make your opening argument.

MR. SIDMAN: Could I have twenty minutes?

THE COURT: All right, twenty minutes a side. I think you can stay within that in this case.

MR. LIFF: How many minutes, Your Honor?

THE COURT: Twenty minutes on each side.

I think what I will do is to let Government counsel make his opening argument, and then recess for lunch, and then we will conclude the case after lunch.

All right, bring in the jury.

(Thereupon the jury entered the courtroom.)

207 OPENING ARGUMENT ON BEHALF OF THE GOVERNMENT

MR. SIDMAN: Your Honor, and ladies and gentlemen of the jury: We have reached that stage where closing arguments are to be made to you by both counsel, and I am now going to make my opening argument. Mr. Liff may, depending on the time, argue to you right after lunch, and that is where we are now.

My purpose now is to review for you the evidence as the Government sees it, which was adduced to prove the crime with which the defendant is charged.

I am going to talk about the facts, and it is quite possible I might misstate them, but I am trying to recall them as best I can, and I have made notes, and if I make a mistake, please disregard what I say, because it is your recollection that controls.

With this copyright or warning, I will proceed with my recollection of what the testimony was concerning the facts in this case.

Miss Mary Waley, the young woman who worked for the High's store, and her address I don't recall, it was in the District of Columbia, but she was there one afternoon about 4 o'clock, and she is stocking the shelves, and someone comes into the store, and then she doesn't come out immediately.

She is dilatory, and as she stated on the stand, as I remember it,
208 that she was waiting for her relief, which is a reasonable assumption, that she just wanted this fellow to leave.

But in any event he doesn't leave and after about three or four minutes, to the best of my recollection, she comes out, and she says to him: What do you want?

And he says: Give me all the money.

She said she was frightened, and she did. He had his hand in his pocket and from what she could see, he had a pistol. She saw apparently the butt of the pistol, it is my recollection, but he didn't pull it all the way out.

After giving him fifty dollars, I believe, the valuation of how much was missing from the cash register, which was subsequently made, he left, and that is July 27, 1962.

And she called the police and gave them a description.

Now, we hear nothing more of the defendant Drew, and if possible, let me say this, I tried to keep these two incidents of July 27th and August 13th separate, because these are two different crimes.

We hear nothing more of the defendant Drew until August 13th. We do know that Miss Waley quit High's because it was too dangerous. But on August -- and whether she quit before or after August 13th is irrelevant, but on August 13th about 5:45 Mrs. Hughes, seated in the courtroom,

is working alone in a different High's store, at 5119 Grant Street, and in walks the defendant, and she identified him, and he says: Give me all your money, and I think my recollection is that at this time, as well as the time on July 27th, when he was wearing sunglasses for the robbery, he said, give me all your money.

This Mrs. Hughes, however, does not react as did Miss Waley. She said: If you want it, you have to come and get it. And he doesn't display any gun.

And this demand for the money is made by the defendant three or four times, and she refused, saying, If you want it, come and get it.

Now about this time a customer walked in and he left.

Let me say, parenthetically, the reason that the Government produced Mrs. Ross was not to identify the defendant, because she could not, he left as she came in, but there was a person on the scene, and you might wonder, Well, who was there?

Well, could this person who came in see the defendant, and we produced this witness to show that a person did come in the store but could not identify the defendant.

In the same way Paul Smallwood was produced. He could not identify the defendant either. As he entered, the defendant left.

210 And Mr. Twombly, whose appearance may raise some question in your mind, is simply here to prove the High's Dairy Products Corporation is a corporation. It is essential that we do so in proving the case, in a robbery, that this was money that belonged to High's.

Now, after Mrs. Ross entered the store, and the defendant leaves, Mrs. Hughes goes to the telephone and calls the police and give them a description of the defendant.

Moments later, Officer Williams in company with another officer, Officer Walters, stops the defendant on the street in the vicinity, in the immediate vicinity of the High's store at 5119 Grant Street.

The car pulls over and he says: What are you doing, I think was the question, I am not sure, and the defendant stated: I am coming from

my girl friend's home, I am just coming from my girl friend's home. And this defendant was sweaty and perspiring and had his hat in his hand, and the officer takes or starts to move the defendant back towards the store.

Officer Olds, who received a report on this robbery was at the scene, and comes upon the scene at this time, and takes the defendant from Officer Williams, who then goes on with his call, and this was an automobile accident he had.

211 Officer Olds takes the defendant into the store where Mrs. Hughes is, and Mrs. Hughes had made a telephone call to the police, and Mrs. Hughes said: I think that is the man, I am not sure, he was wearing glasses, and the glasses are on the defendant's person, and they are produced, and she said, That is the man.

Then he is taken down to police headquarters -- no, excuse me, thereafter, after the identification is made, Detective Rogers, who wasn't present at the time of the identification, as I recall it, takes the defendant -- I think Olds takes the defendant down to police headquarters, with Rogers taking control of the defendant at No. 14 Precinct.

At that point the defendant denied the offense, and he has given a false name, not even his given name, Nathan Drew, and he is advised that he is charged with the robbery, the attempted robbery, which has just taken place minutes before, and Detective Rogers notes the similarity in the events of July 27th and August 13th, and calls Miss Waley, who was robbed on July 27th, and he tells the defendant, and Miss Waley comes down to the station, and he tells the defendant, I am going to have a lineup, and we are going to charge you with the robbery of July 27th if you can be identified, and Miss Waley comes down and does identify the man.

Now, also, of course, you heard the witnesses who identified the man who robbed them, and attempted to rob them, here in court.

212 Well, she identifies him, and he is charged. What does he say? He says: I did it. And that is not unusual that he should say that. He has been identified, and has been arrested fifteen minutes, not even that

much, some minutes after the robbery, and he immediately thereafter, he is identified as the fellow that pulled the job on July 27th.

He said: I did it, but don't bother writing it down because I am going to deny it when I come to court.

The statement is made to Detective Rogers in the presence of Detective Chaplin, and I think that is where we stand.

The case, I think, developed that there are clearcut identifications by people, who are residents of the community, who have absolutely no reason to say something which they do not mean to say, and are not sincere about, or which is not true, and this is not just one random identification, but these are clear-cut studied identifications, of eye witness identifications of that man, by people who have had a clear opportunity to see him, and who are firm in their position that this is the man.

Now, I suppose we can doubt, but can we impute malice to anybody in the courtroom, anybody who testified? I don't think so. Certainly not to Miss Waley, any witness like that.

213 Their identification is clear and undisputed, and we can rest the case on that line, but we don't have to, because there is a confession.

Now, there is an issue in this case, as in most cases, as to whether any statement made by the defendant was voluntary. There is nothing that was produced to you, testimony before you, to the effect that the statement was not voluntarily made. It was brief, abbreviated, and you might even say it was short, but we have a confession.

Now, I don't want to be presumptuous because it is the Government's burden to prove a case beyond a reasonable doubt, but in a case where there are two crimes, where there are several witnesses who identify the defendant clearly --

MR. LIFF: I object to this, Your Honor, and move for a mistrial and ask for a severance in this case.

THE COURT: Now, just a minute, counsel.

I suggest that you not argue that there is no denial of evidence to refute this.

The jury will disregard that, and let us proceed.

MR. LIFF: I would like to make my motion for a mistrial on the basis that both crimes have been tied together.

THE COURT: I think you are assuming something that probably counsel is not arguing.

214 There is no duty upon a defendant, and which I shall tell the jury in a few minutes, to take the stand or deny anything or offer any evidence in his defense. That will be explained for the jury, if that was in the District Attorney's mind, which I do not think it was.

The jury understands that, that there is no duty upon the defendant to prove his innocence. The duty and burden is on the Government to prove his guilt beyond a reasonable doubt. I will explain that in detail to the jury.

All right, you may proceed.

MR. SIDMAN: I will take only a moment or two more of your time. I am sorry I caused this concern.

The defense, as I see it, is obfuscating, which is saying that something was seen at 5:45 rather than 5:57, although it happened last July and August, or someone was taken somewhere at 6:05 rather than 6:10, that, well, Officer Walters and Officer Williams arrested the defendant on the street and apprehended him, and probably Officer Williams is here, and Officer Walters should be here.

In addition, there is the question of whether the people in the lineup were five foot seven, five eight, or five ten, and can we recollect the height of the people in the lineup. Well, this is what I mean by the defense of obfuscation, nothing less.

215 Matched against that is the credible testimony of witnesses, with no reason in the world but to come before you today and tell you the truth as to what they have done.

I will probably address you for a few minutes after Mr. Liff finishes, and I will ask you to return a verdict of guilty.

THE COURT: Mr. Liff, we usually recess for lunch by 12:30,

and so that I will not have to interrupt Mr. Liff, who will address you next on behalf of the defendant, we will now recess for lunch until 2 o'clock, at which time you will hear from Mr. Liff.

I will excuse the jury. You will be excused until 2 o'clock.

(Thereupon the jury left the courtroom.)

MR. LIFF: May we approach the bench?

(Thereupon counsel approached the bench and the following occurred:)

MR. LIFF: At this time, Your Honor, I wish to renew my motion for a mistrial predicated upon the statement that was made by Mr. Sidman to the jury, which tied the two crimes together, by referring to one and the other as relating, or at least tending to support each other.

This was the basis of my motion for a severance at the beginning of the trial, and which motion I would like to now renew, and state that I think the statement of the prosecutor to the jury was definitely pre judicial for the defendant, and that is the basis of my motion, and I again renew the motion and ask for a new trial.

216 THE COURT: All right, the motion is denied, will be denied.

Do you wish to say anything on the record?

MR. SIDMAN: No, Your Honor.

(Thereupon at 12:20 o'clock p.m. a recess was taken until 2 o'clock p.m.)

217 AFTER RECESS

THE COURT: All right, Mr. Liff.

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT TO THE JURY

MR. LIFF: May it please Your Honor and ladies and gentlemen of the jury: We lawyers know that during the process of a trial we frequently in advocacy do things and lots of times make statements perhaps and do things which are not strictly --

THE COURT: Mr. Liff, will you speak a little louder?

MR. LIFF: Might not be strictly in accordance with the established procedures and the law involved, and if I have in any such respect conducted myself, I want to take this opportunity, first, to apologize both to

the Court and the jury, and to assure you that I do this only for one reason, that there lies in your hands now the fate and the life of a young man. Shortly I will be through, and I will have, I trust, to the best of my ability, performed the function assigned to my by the Court, and I will have attempted to persuade you, to present to you what evidence there is available to us, and to have argued that evidence to you, and then you will retire to your jury room, and I will be through.

I will have discharged my duty, and then your very onerous duty will commence, because upon you then, you twelve ladies and gentlemen,
218 will depend not some light matter of money, not some like determination, but a consequence of the direct effect, what is going to happen to this young man.

Where is he going to be? What kind of a life will he have? What will be of him in the future?

This is your duty, and I am convinced that I am satisified that you will discharge it to the best of your ability, as I have tried to discharge mine.

I want to address myself now to the facts and to the case that you have heard adduced before you.

Now, this young man, and before I say this, I must say that the defendant in this case has also been in my opinion under a burden, which is an unusual one, one which imposes upon you, the jury, a most unusual one, in my opinion.

You have a man charged with two separate crimes, two separate events, separated by more than three weeks, almost three weeks, forgive me, almost three weeks.

You are charged with dividing these things in your mind. You must not, and I know how difficult this may be, but you must not, I implore you, and the Court will direct you, that you must not permit evidence as to one of these events to sway you in the slightest as to the other event, because if you do, if you do, then a prosecutor may prove his case by multiplicity of accusations, and nothing more, and that would

be a dreadful time, if we should ever come to it.

218-A Now, I know this is a difficult task you are assigned, and as I talk with you I find difficulty in not interweaving these things, and if I should interweave them, please excuse me, because I am nothing more than human, just as you are, but you cannot excuse yourselves.

When you go back into that jury room, you must separate them down the line, and you must be sure, this is vital, this is a terrible burden upon the defendant, it is a terrible burden upon you, and you are sworn to carry it out.

Now, let us examine the facts.

A young man is accosted on the street. He is accused, and he is put into a jail. He is kept there. He is brought before you, he has never seen the light of day except through bars since that time.

He has had fortunately, or unfortunately, two lawyers assigned to try to help him. We have done our best. We have looked for what we could find, but when you are not on the scene, what do you find?

Suppose any one of you were accused of a crime on January 2nd, do you know where you were on January 2nd? Could you produce witnesses as to where you were on January 2nd? Could you tell why you had not committed a crime?

In this case, we were very very recently very fortunate and we have adduced such a witness.

219 Up until that time, what did we have? Something that Mr. Sidman has snidely referred to as obfuscation, we have tried to obfuscate, we have tried to dull and darken.

We have their witnesses. We haven't had access to them. We haven't talked to them. We see them on the witness stand, and what did I try to do? I tried to probe, to test, to try, to see whether these people were more than human, whether they were just human beings who were capable of mistakes, and whether their recollections were true recollections.

I have tried by my questions to bring before you some understanding

of what they were really testifying to, and how much real recollection they had of what was going on, and how much credibility, not in the sense that they were deliberately trying to railroad a man, not in that sense, but just in the sense that they are ordinary human beings, who have made mistakes, and I believe that we have demonstrated to you that there is a very real reasonable doubt as to the testimony, as to the correctness of the charge on which this man stands charged before you today.

Let us examine some of the testimony. Mrs. Waley, you will recall, is the lady who testified about the robbery, that is the event which occurred on July 27th, and again may I take advantage of saying an apology, and it is a true one, that Mr. Sidman suggested for himself and myself, I believe, and that I will try to state the facts as I recall them from the testimony.

220 We cannot make complete notes, and there will be a very real attempt on my part to impart to you my recollection. However, please do not ascribe this to an attempt to mislead you, but only to the same sort of thing which I am saying these witnesses are capable of, human error, and your memory of the facts will necessarily have to govern.

Mrs. Waley testified to the robbery, and you will recall that there was considerable testimony that she was not -- that in the lineup there were five men, and that when she first looked at them, she was not sure, were the words, not sure, of the identification, and so they had the accused put on sunglasses.

Now, sunglasses are dark, and I may be stating something that you wonder why I say it, but they are dark. They are like a mask. Now, if you put sunglasses on that young man, to me, he could look like any thousands of other young men I have looked at, and then he would look like them, and I could say, Yes, he looks like them.

But is that an identification? Is that the sort of thing on which you would want to rest your determination after hearing her other testimony on the stand?

Remember that this was the lady who observed him for five minutes. Now, why five minutes? Because this gives you a good opportunity to see, remember, note, and remark.

221 But what happened in those five minutes? Six bottles of milk were transferred from a carton to a milk cabinet.

Five minutes? More nearly perhaps ten seconds, twenty seconds, thirty seconds, but why five minutes? Why did she say five minutes?

Now, you don't have to believe everything the witness said, and if you find that a witness has not been truthful with you in one respect, you have the right to disbelieve their entire testimony, and I believe the Court will so charge you.

Why did she seek to bolster this identification by saying that for five minutes an employee stayed in back of the store and refused to wait on this person? Because she knew, she knew that she was going to have to say, this is the man, and how do I get to say that? By saying that I watched him for five minutes.

Did she? Did she not talk to any other witness as she said she did?

Now, you don't have to come in here completely devoid of all prior experience. You may bring into the jury box with you, and in weighing the witness's testimony, you may bring in with you the common experiences of man, your experiences, and you may weigh this testimony in the light of what you know human beings to be, and how they act.

222 'Very, very certain was she, of the day of the month, because such an event cannot be forgotten, but the day of the week? No recollection whatsoever.

'Why? It was not necessary. Not necessary? Did she remember the date of the month because it was necessary? Or did she remember it because of some other reason?

Why was it necessary? She said she remembered it, by the way, because of the startling event. But then she said, necessary. Was this because this had to be in the testimony or a case could not be made out against him?

Is this why it was necessary? And did she decide that it wasn't necessary to remember the day of the week herself, as she said, or was this a fact over which she had gone over and over again, because you cannot accuse a man of having robbed this store on July 22nd when it happened on July 27th. Was this truthful testimony on her part?

I have my opinion of it, and ladies and gentlemen of the jury, you must formulate your opinion of it.

I submit to you that her testimony is certainly beclouded by doubt. What other doubt is there on the testimony?

During the course of our investigation we were fortunate enough to come upon a woman who we brought before you today, Theresa Powell, and you remember she said that after he left her house she had no concern with him. As a matter of fact, he still owes her fourteen dollars.

223 Now, you observed her. You heard her testimony, and you heard Mr. Sidman cross examine her.

Now, what did she say? She said she knew the date because the preceding week end she had attended a funeral in North Carolina, and that was her husband's pay day, a day which to every housewife is a day well to be remembered. My wife remembers pay days very well, at least her pay day.

And so she remembered this day. Now, where was Mr. Drew on that day? From 2 o'clock in the afternoon until 7 o'clock in the evening, in her house, in her house.

Now, why would she lie about this? Apparently it meant nothing to her. He owes her money. She owes him no debt. She did not lie about it. These are the facts.

She came here and testified to them because we subpoenaed her to come in here and testify. She was here because we brought her in.

You heard her cross examination. Was there anything in her testimony which would cast any doubt upon the fact that she was testifying to you truthfully in accordance with her recollection, and she was certainly by an event which she pinned very carefully in her mind, and that was the funeral of her niece and the pay day of her husband, because on that day they went out and got some beer and on that day perhaps they were able to afford it.

224 So instead of being where Mrs. Waley said he was, the defendant was then in the home of the witness.

Now, he could not be in two places, he could not be in two places, and so as to this point, as to this event, not only is there a reasonable doubt, but I think that we have proved that he could not have participated in this crime of which he is charged.

Now, let me turn my attention and yours, as a completely separate event, to August 13th. On August 13th, at some time in the early evening, he was accosted 25 yards from a High's store where an unfortunate event had taken place.

You will remember that Mrs. Hughes, Mary C. Hughes, testified that it was ten to fifteen minutes that she put in the call to the police station, or it may have been from the time he left the store, I don't recall; it was one or the other, to the time that the police arrived for the first time. It was then some ten or fifteen minutes until the police came back into the store with the defendant.

Take the least of those times, a total, an aggregate of twenty minutes. Twenty minutes after the call went in, or he left, whichever the fact was, they brought him back into the store.

Now, you will recall that one of the police officers testified that from the time they accosted him on the street to the time they took him back into the store, was one minute. One minute.

225 Therefore we must account for between nineteen and twenty-nine minutes. In this nineteen or twenty-nine minutes, a man who looked abnormal, very abnormal, because he was perspiring on August 13th, abnormal, very abnormal, because he had his hat in his hand, was found where? Hiding in a church? Hiding in an alley? Running? Attempting to escape?

No, no -- twenty five yards away, walking normally.

Is this in accordance with your understanding of human reactions? Was he panting? Excited? No.

He was walking normally, perspiring, hat in hand, on August 13th. I should hate to have to be accused of crime every time I have walked on August 13th, perspiring, with hat in hand. And I venture to say, neither would you.

This is where he was found. Is this in accordance with normal human reactions? Is that what you would have expected a man to have done?

Now, so they take him, and now we have got two police officers, and no, they are not holding on to him, they are walking with him, and they take him back into the store, where an excited lady has just experienced an event which, of course, is regrettable, which, of course, must excite anybody, and they ask her to identify him, and she cannot without glasses, and so they put sunglasses on him again.

226 And I must refer to his dark color. He is a dark young man, and dark glasses, why, I think he must look like a thousand, several thousand other young men in the Washington area.

And after she says she cannot identify him without the glasses, they put on the glasses.

Remember, he had not had an opportunity to change his clothing. They didn't say, is this the clothing? No, she could not tell without glasses, and so they put dark glasses on a dark young man, and what does he look like? Like a dark young man with dark glasses. And she said, That is the man, she identified him.

Now, these events take place, when a young man is picked up --

THE COURT: Excuse me, Mr. Liff. I will give each side ten minutes more. Your twenty minutes are up. You can have ten minutes more, and I will give the Government ten minutes more.

MR. LIFF: Your Honor, the time went by without my realizing it.

THE COURT: I understand.

MR. LIFF: And they take him to a police station.

Now, before I get to the police station, did we attempt to obscure, did we attempt to obfuscate when we examined the officers and the detective as to their testimony?

227 We were probing. We were trying to find out where we might find something that we could not otherwise know. Remember, these are members of the police force, and I have nothing but the highest admiration for them in the performance of their duty, but I am charged with

trying to find out from them something which will prove what my client has denied from the very beginning, and he stands before you because he has denied it. If he hadn't denied it, he wouldn't be standing before you.

And what do I find? I find an officer who says that he made out a written report immediately after a questioning. And I get him to give me that report, and what do I find in it?

This is the same officer who testified to an oral statement, which he put before you and asked you to depend upon in your consideration of his statement, and on this typewritten statement, as to each of the crimes, I find the statement: The defendant denies the charge.

And so although he had already testified, and although the defense had closed its case, I called him as my witness, and I had him on the stand read to you what they said, and you will recall that he said he wrote this after the questioning. After the questioning.

Now, if there was anything in his mind at the time he wrote this and he was making a report on official police business, why did he not put into that report the thing he testified to before you today?

228 He did not do it because I believe it never happened.

THE COURT: Now, just a minute, counsel. I have to sometimes stop counsel.

I am sure you appreciate that it is not a question of whether counsel believes something happened or did not happen. You may argue that you do not believe that the evidence disclosed that he did this, or that something didn't happen. I have no objection if you refer to the evidence, but you may not, and this goes for either counsel, express your personal opinion as to whether or not anything happened, that a certain thing happened. You may argue from the evidence and draw any inferences that you wish from the evidence.

All right, you may proceed.

MR. LIFF: I apologize, Your Honor.

THE COURT: Very well. I don't say you did it intentionally.

MR. LIFF: Now, ladies and gentlemen of the jury, it is for you

to determine whether you believe in the light of this testimony that he made this report immediately after the questioning. It was a typewritten report made in the performance of his obligations and duties as a police officer to the Police Department.

You recall that I asked him, do you have your records concerning the arrest and the events with you, and he said, yes, and he handed them to me.

229 If this had happened in the way he testified to it on the stand, it would not have appeared in that typewritten report, not that he omitted as to one of them, but this peculiar variance from normal police procedure happened in two separate reports.

You will recall that when I asked him, is it not usual and normal and regular police procedure to get a written statement, and he said, yes. There was nothing in those reports, no testimony adduced before you, that there was any statement in explanation of the clear-cut statement, in qualification of the clear-cut statement, in derogation of a clear-cut statement, on each of these reports, the defendant denies the charge.

Surely, we thought to discover from that, from the police, what real memories they have of these things.

And so you will recall the police officer testifying that he alone accosted him on the street, that is, Officer Williams, and then you will recall Officer -- I forget the other officer's name -- testifying that when he came upon the scene that there were two officers there, two officers, Officer Williams and Officer Walters were standing on the street with the defendant.

He stated that he went over to them. They had stated that they

230 took him over to the store. Now, these are not important things, these are not important things, and I do not want to rest my client's fate on whether this happened one way or the other, but these little forgetfulnesses are of value to you in evaluating and weighing whether their memories are serving them well or ill. These are important for such purposes.

Now, I suggest to you, ladies and gentlemen of the jury, that in the light of these inconsistencies, in the light of the variance from normal police procedure, in the light of Officer Rogers's failure to note on these reports anything to the contrary, that there cannot help but be in your mind a strong doubt as to whether these events happened with respect to this young man or not.

Whether this is the young man that went into that store. Whether this is the young man who went into the other store.

With respect to Detective Rogers, I do want to note one additional fact. While he was very careful to state that he had warned the defendant of his constitutional rights, when I asked him had he warned him or advised him of his right to counsel, he could not remember. He could not remember. He remembered his constitutional rights, but the equally important right of a right to counsel, he could not remember. This struck me -- I withdraw that remark.

231 I put it to you, whether a detective experienced in his line of work would remember that he had advised him as to his constitutional rights, but would not remember as to whether he had advised him of his right to counsel?

Ladies and gentlemen of the jury, it is not on us to prove to you that the defendant is innocent of these charges. If that were our burden, it would be a horrible one, because not having been there, except for the fact that as to one of the charges, we were finally able to locate a witness who could say where he was, and except for recollection about where you might have been on a particular day and at a particular time, and be able to demonstrate it, except for this, a defendant who was not there can offer his defense almost only through the contradictions of the witnesses on the other side, the witnesses adduced by the prosecutor.

Now, this we have done. This we have done, I think, successfully.

We are entitled to every reasonable doubt, and if you find that there is a reasonable doubt, you must find for the defendant. The case of the prosecution rests solely upon, in my opinion, solely upon identifications made, which I think are very weak.

In your common experience, you know and you have heard of many identifications which are later shown not to be correct, and you may take this experience back into the jury room with you.

232 In the newspapers of this city on Nobember 21st of this year, there was reported --

THE COURT: Now, just a minute. Are you referring to some case?

MR. LIFF: Yes, Your Honor.

THE COURT: I don't think you should. You may argue to the jury that they may rely on their experiences and their common knowledge. They read newspapers.

MR. LIFF: Well, here is a case which occurred only 21 days ago --

THE COURT: Wait a minute, counsel. Don't let's argue about another case.

MR. LIFF: Well, you ladies and gentlemen of the jury read newspapers, and you have been reading them through recent months, and in your experience you know that eye witnesses of events of this sort very honestly can be mistaken, and unfortunately, more frequently than we would like; honestly, here are two weak identifications.

We have destroyed one beyond any question of doubt. We have proved to you where this man was when a witness said she identified him as being at another place. This is destroyed completely. The other, I think, we have shown you its weaknesses.

Now, I am about to conclude my job. I want to leave with you

233 this thought, that each of you must weigh for himself and herself these facts.

Do not permit yourself to feel that simply because the Government has brought this man before you, or somebody else might be convinced a different way, that this should guide you.

Each of you must in your souls and in your private hearts weigh whether this man is guilty beyond a reasonable doubt, and if you find any basis in reason for doubting that the Government has made its case, you must, and I am convinced you will, in each of these charges find the defendant not guilty.

Thank you.

THE COURT: Mr. Sidman.

CLOSING ARGUMENT ON BEHALF OF THE UNITED STATES

MR. SIDMAN: Ladies and gentlemen of the jury, Mr. Liff has impressed upon you that this is serious business that we are about, and the defendant is charged with two serious crimes, and he can go to jail for a considerable period of time. No one is denying this fact. Robbery is a serious crime, particualarly robbery with a gun. This is all very serious business. People come to this courtroom and testify from the witness stand and they realize that.

Now, Mr. Liff fired quite a blast from a shotgun. I am going to address myself, not to the significance of this proceeding, I think he

234 did that quite well, but I am going to readdress myself to the testimony of the witnesses, what you heard from the witness stand and what you didn't hear.

You heard somebody, Officer Williams, when he was on the stand, the first thing he asked the defendant is, What are you about, what are you doing?

The defendant says: I just came from my girl friend's. Where is the girl friend?

MR. LIFF: Your Honor, I object to that. I object most strenuously to that remark.

THE COURT: Overruled. Let us proceed.

MR. SIDMAN: I might say, parenthetically, that Mr. Liff has testified to the state of the defendant at the time of the arrest. That is not in the record before you, and there has been no testimony to that effect, and I think that the Court need not tell you to disregard it, but what you consider is what the witnesses said on the stand.

Now, I didn't hear anybody talk about where the defendant has been since his arrest.

Mr. Liff also said he had no access to the Government witnesses which were on the stand. That, forgive me if I testify, if I say that is

not a fact, that is not true. He did make access, and indeed, if you recall, Mr. Liff for the defendant summoned Officer -- I forget the officer's name -- and Detective Rogers, who did take the stand about
235 the reports.

Now, poor Miss Waley has been made in the short space of 35 minutes a defendant in this proceeding. I had no doubt that she would, and along with the strategy of talking in terms of five, ten, and fifteen minutes, very often you will find that a witness, turned into a defendant for purposes of the trial. That is what happened here.

I am not by any remark accusing Mr. Liff of any bad faith, and he is simply arguing, but I would like you to be aware of what has happened in the space of 35 minutes.

Now, the business about the constitutional rights, or the warning by Detective Rogers. Detective Rogers testified, I believe, that he told the defendant that he was under arrest, that he was charged with this attempt, and that if he was identified in connection with the July 27th robbery, he was going to be charged with that too, and anything he said would be used in court against him.

I heard no testimony from that witness stand, it is a question of law, but I heard no testimony that a warning by a police officer to a man charged with crime is a constitutional right. That is a question of law which is not in this case. To the extent that we discuss conclusions of law, that is something outside the case. I may disagree with Mr. Liff on this, but in any event it is irrelevant. The question is, was he warned of his right, that you don't have to say anything, and if you say something,
236 it can be used against you. That is what the officer testified to.

Now, there is one other delicate point, and we might as well face it. I have no opinion one way or the other, and indeed, I will not offer any, as to whether Mrs. Hughes, when faced with the defendant with or without sunglasses, finds him looking like a thousand young men in the city. That is something for you to consider, as to whether she is so confused by sunglasses as being a mask for a young man, that she cannot

make a distinction between the two. She identified him here in court and she identified him at the store. And indeed she was not the frightened panicked woman that Mr. Liff would have us believe. She was the one who fortunately for the defendant, did not have a gun. She said, If you want the money, you come and get it. That is not panic.

Of course, there is an alibi witness in this case, and there is direct conflict. If you believe her, first let me tell you this, if you believe the alibi witness that means that Police Officer Rogers was building up this case against this defendant for some purpose, that he did not confess to the crime, and that this is all fiction.

In addition, if the police officer lied about the confession, we have Miss Waley also lying about the identification. Now, that is a lot of prevarication in this case.

237 In any event, this lady who came in, Mrs. Powell, doesn't take in boarders, but does take in the defendant. She has not seen him for a year, approximately a year, but all of a sudden up he shows, coincidentally on the date that he is charged with a crime. He stayed for five hours.

This is important, and Mrs. Powell can remember for various reasons, it was her husband's pay day, and obviously her husband had more than just one pay day, but be that as it may, all of a sudden, after about three weeks, the defendant having lived there, disappeared, and thereafter someone, allegedly the defendant's brother, and of course, we don't know, because the only testimony is that it was someone who came there and said it was the defendant's brother. We don't know whether he was the brother or not, but the defendant is in jail and didn't have clothes, and there is no conversation about what he is charged with. After all, so the witness said.

He was charged with a crime on the 27th of July, and this woman says, my goodness, I remember that day, he wasn't there, no, but there is no conversation, she said, between this alleged brother and the witness, and thereafter there is this disucssion with a neighbor, says the witness, who allegedly saw something in the newspaper.

What did she see in the newspaper? We don't know, but unfortunately again there was nothing in the paper obviously about the 27th of July, when for five hours this defendant allegedly sat in her living room,

238 and finally about a month ago she is contacted by defense counsel, and that certainly was legitimate, because he can go out and dig up every witness.

Now, we may assume where defense counsel got the information.

If on the 27th of July, the defendant was in the company of the witness Powell, why the silence? Why is it that from the 27th of July, or August 13th, the date of the arrest, until a month ago, that nobody has contacted Mrs. Powell to say, Is this so, is this not so.

No, but all of a sudden, a month ago, Mrs. Powell was contacted.

Now, I can only speculate, and it is your speculation what underlies Mrs. Powell's testimony, but I think that is irrelevant. I do think that you may, based on her testimony, and based upon the impossible conflict between it and all the witnesses for the Government, you will find this inherently incredible.

MR. LIFF: Your Honor, I object.

THE COURT: Do you object?

MR. LIFF: Yes, sir.

THE COURT: State your objection.

MR. LIFF: Your Honor, I object to the fact that this summation,

239 both in this instance and once before when I tried to object, is putting the two things together, putting the two crimes together, and he is conflicting with all the witnesses --

THE COURT: I am going to tell the jury that these are two separate and distinct offenses, that they do not have to find that he was guilty of both of them, or not guilty of both of them. They can find he was guilty or not guilty of either one or both. There is no connection between these two offenses.

If you give me a chance to tell the jury, I will tell them that.

I don't care what Government counsel says, or what you say about it, there is not any connection between these crimes.

All right, now, let us proceed. I cannot do it until I charge the jury.

MR. SIDMAN: I think that addressing finally myself to the evidence, there is a confession testified to by a responsible officer of the Police Department. There is a clear identification here in the court at the time of trial.

There is one alibi witness, who I believe you can find from the evidence to be incredible testimony.

THE COURT: Will you speak a little louder, Mr. Sidman?

MR. SIDMAN: Yes, Your Honor.

240 And may I suggest or request, the Government requests that you ladies and gentlemen of the jury return a verdict of guilty as charged as to both the robbery count in the indictment and the attempted robbery count in the indictment.

Thank you.

(Thereupon the Court charged the jury as follows:)

241 CHARGE OF THE COURT TO THE JURY

THE COURT: Ladies and gentlemen of the jury, the introduction of evidence in this case and the arguments of counsel now being concluded, it becomes the duty of the Court to instruct you as to the law that should guide you in your consideration of the evidence and the determination of your verdict. As I probably have indicated before, arguments that are made, or just have been made to you by counsel for the Government and counsel for the defendant, while they perform a very useful function and service in every case, whether in a civil or criminal case, of course, is not the evidence in the case. The testimony and the evidence in the case is what the witnesses have said or told you from the witness stand. However, it is necessary for counsel for the defendant to summarize his theory and his contention, and also for the Government.

However, if their inferences, or the inferences and deductions that counsel, either counsel, draw from the testimony differs from your inferences, or the inferences you draw, or the deductions or conclusions, or anything you want to call it, it is your inferences and deductions that are important. You are the ones to draw the inferences or deductions from the testimony.

Likewise, when a lawyer propounds a question to a witness, whether it is the District Attorney or the defense counsel, and in the

242 form of a leading question, says in effect: Isn't it a fact that you robbed so and so yesterday, or two weeks ago; that doesn't make that offense proved beyond a reasonable doubt.

He has the right to ask that question but the question is what did the witness say in answer to the question? Now, you may believe the witness or you may not believe him. That is your function.

Now, when you retire to the jury room in this case, you will take with you a copy of the indictment returned by the Grand Jury in this case. The purpose of an indictment is simply to inform the defendant of the charge or charges which have been brought against him, so that he will be able to prepare his defense, retain counsel,

and to meet these charges when the case comes on for trial, as has been done in this case.

Now, an indictment is not to be considered by you as evidence against a defendant, and it should not be regarded by you as testimony or evidence against this defendant, nor as being of any probative value, nor as being entitled to any weight whatsoever as evidence.

Now, what do we mean by that? It is very simple. All of you have heard about the Grand Jury. We have a Grand Jury composed of 23 citizens of this district, that are probably in session in this courthouse right now listening to cases. Now, the Grand Jury differs
243 from a petit jury. You are the petit jury. You are the jury that hears both sides of the case, and decides what the facts are.

Now, the Grand Jury does not hear both sides of a case. When a crime is committed, and there is probable cause to believe that there is sufficient evidence against a man or a woman to bring the case before the Grand Jury, then one side of the case is presented, which is the Government's side, and if the Grand Jury feels that there is sufficient evidence to return an indictment, they will do that. If they do not think so, they will ignore the case.

However, the law as it has been built up for centuries states, and advisedly so, that the mere fact that a person is indicted by a grand jury is not evidence against the defendant. That is exactly what I just told you. An indictment is not to be considered as evidence against a defendant. It is simply a charge or it is a means by which a case is brought to trial. It is a means by which a defendant is informed of what the Government is accusing him. That is the only purpose of an indictment, and you should draw no unfavorable inference or speculate or assume that because a person has been indicted he is probably guilty.

Now, the defense in this case, as I understand it, is what is known as an alibi defense, that is, the defendant contends that he not only did not commit the crime set forth in the indictment, and again

244 let me impress upon you that there are two separate offenses charged in this case, one alleged to have been committed on July 27, 1962, and the other on August 13, 1962, and there is no connection whatsoever between the two offenses, although he is charged, and he has a right to be charged that way, but the Government must prove his guilt beyond a reasonable doubt as to each one of those offenses.

That is, he contends that he not only did not commit the crime set forth in the indictment, but that he was at some other place at the time of the commission of the said offenses.

If after a fair and impartial consideration of all the evidence, the jury believes that the defendant was not at the scene of the commission of either one or both of the crimes set forth in the indictment at the time the Government alleges that he was, and that the defendant was at some other place at the time the crimes were allegedly committed, if the crimes were committed, and you do not believe that the Government has proved the charges in this case beyond a reasonable doubt, as I shall explain that term to you in a few moments, then it would be your duty to acquit the defendant of the charge or charges in the indictment.

Now, it is known to all of you by this time that the defendant has not elected to take the stand and testify in his own behalf. This is his

245 constitutional right. The Constitution guarantees to every person accused of crime, not only a fair and impartial trial by an impartial jury, but it guarantees to each defendant that protection, that is, there is no burden upon the defendant to get on the stand and prove his innocence. The burden, as I shall tell you in a moment, is upon the Government to prove his guilt as to each specific charge beyond a reasonable doubt, and you must not speculate or conjecture or guess, or anything like that, why he didn't take the stand and what he would have said had he taken the stand, because he has elected to stand on his constitutional right and not testify. Therefore, each and every juror must not draw any unfavorable inferences or deductions or assume in your own mind that because he didn't take the stand he

is probably guilty. Now, if you did that, you would be violating the law, I mean, your oath as jurors. That is his right. He doesn't have to take the stand, and he doesn't have to say a word in his defense.

It is up to the Government to prove him guilty beyond a reasonable doubt, not only this defendant, but every other defendant who comes into a courtroom.

Now, the law is, as I just stated, a defendant is presumed to be innocent of the charges contained in the indictment, and the burden of proof is upon the Government to prove him guilty to your satisfaction beyond a reasonable doubt. Unless the Government sustains this
246 burden and proves beyond a reasonable doubt that the defendant has committed every element essential to the crime charged, then the jury must find him not guilty.

Now, some mention, some statement has been made about the dates of the offenses. As I told you before, that is immaterial. He is charged in the indictment with committing two separate crimes. You must believe beyond a reasonable doubt, if you believe so, that he is guilty beyond a reasonable doubt as to each separate charge. In other words, you might find him not guilty as to one charge or guilty of another. You might find him not guilty of both charges, or you might find him guilty of both charges. This is something you will have to decide from the evidence in the case.

As I said to you a moment ago, the burden of proof is on the Government to prove a defendant guilty beyond a reasonable doubt, but not beyond all doubt whatsoever. In other words, the Government must prove the defendant guilty to a moral certainty and not to an absolute certainty.

As you probably are aware, we have not arrived at that stage of science yet where we can have a television camera or a camera man present who can actually take a picture of somebody committing a crime. So necessarily, the Government or the State must depend upon witnesses, and their recollection as to what transpired or

happened. It is up to you to say whether you believe the witnesses or you think they were mistaken.

Now, as its name implies, a reasonable doubt is a doubt for which you can give a reason to yourselves. It is a doubt based on reason and not just any whimisical conjecture or some capricious speculation.

I think I can explain to you the meaning of the term or phrase "reasonable doubt" in simple every-day language. Proof beyond a reasonable doubt simply means this: If after an impartial comparison and consideration of all the evidence, you can truthfully say to yourself that you are not satisfied of the defendant's guilt as to either one or both of the charges, then you have a reasonable doubt; but if after such impartial comparison and consideration of all the evidence, you can truthfully say to yourself that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own personal affairs, then you have no reasonable doubt.

In other words, proof beyond a reasonable doubt simply means that the proof must be such as will result in an abiding conviction of the defendant's guilt, on your part and in your mind, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

In determining whether the Government has established the charges in this case against the defendant beyond a reasonable doubt, you must consider and weigh the testimony of all the witnesses who have appeared before you.

Now, you and you alone are the sole judges of the credibility of the witnesses. In other words, you must determine which witnesses to believe and to what extent you believe them. In deciding how much weight to attach to the testimony of any witness, you may and should consider the demeanor of the witness on the witness stand; his manner of testifying; whether the witness impresses you as having an accurate memory and recollection; whether the witness impresses you as a

truth-telling individual; and whether the witness has an interest in the outcome of the case. All these facts you may and should consider, as well as any other matters which may seem to you to have a bearing on the question as to whether the witness is telling the truth or telling a falsehood.

If you should find that any witness who has testified in this case has knowingly testified falsely as to any material fact, the truth of which that witness could not have been reasonably mistaken, then the jury is at liberty, if you see fit to do so, to disregard any part of the testimony of that witness, or you may elect to disregard all of
249 the testimony of that witness. You are, of course, to base your verdict in this case solely upon the testimony which you believe to be true.

Now, it is the duty of the Court to make known to you the law of the case, and it is your duty as jurors to take the law of the case from the Court. As I stated before, you are the sole and exclusive judges of the facts.

Now, you are admonished not to permit your judgment or your reason or your intelligence to be swayed by sympathy, prejudice, bias, or ill-will, for or against either the Government or the defendant.

You should not be influenced by your feelings or emotions, and your verdict is to be reached in accordance with the solemn oath you took that you will well and truly try this case and a true verdict render in accordance with the law as given to you by the Court and the evidence.

Now, summarizing for you at this time the two charges contained in the indictment, which you will have in your jury room at the time you start to deliberate on this case, the first count of this indictment charges the defendant with the crime of robbery and reads as follows: That on or about July 27, 1962, within the District of Columbia, Nathan L. Drew, by force and violence and against resistance and by sudden and stealthy seizure and snatching, and by putting in fear, stole and took from the person and from the immediate actual possession

250 of Mary M. Waley property of High's Dairy Products Corporation, a body corporate, of the value of about $50, consisting of $50 in money.

Now, that is the specific charge as to the first count of the indictment.

Now, robbery is defined in the law or in the Code or in our Code in the District of Columbia as follows, and this is the law, or the section of our Code under which this count of the indictment is prepared or drawn. It states as follows: Whoever by force or violence, whether against resistance or by sudden and stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery.

Now, you will note that the statute is drawn in the disjunctive. It states whoever by force or violence whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take, etcetera.

You will also note that the law that I have just quoted refers to a taking from the person or immediate actual possession of another anything of value.

Now, you are instructed that the taking from the immediate actual possession means an area within which the victim of a robbery would reasonably be expected to exercise some physical control over his

251 property. It means that it doesn't have to actually come off a person's person, it may be contained right next to them, if they have constructive possession, or possession of that property, and it would be the same as if the property were taken from the person. That is what literally that means.

Now, in this case, the elements of the offense of robbery, which the Government must establish to your satisfaction from the evidence in the case beyond a reasonable doubt, are as follows:

First, that the defendant took from the person or immediate actual possession of Mary M. Waley, property of High's Dairy Products

Corporation, of the value of about $50, consisting of $50 in money. That is the first element they must prove beyond a reasonable doubt from the evidence, and then the Government must prove that such taking by the defendant was by force or violence or against resistance or by putting in fear or by sudden and stealthy seizure and snatching, and they must also prove, the Government, that such taking was within the District of Columbia on or about July 27, 1962.

Now, if the jury believes beyond a reasonable doubt that the Government has proved that the defendant committed this offense alleged to have occurred on July 27, 1962, in any one of the ways enumerated in that count of the indictment he would then be guilty
252 under that count; but if you have a reasonable doubt in your mind as to his guilt on this count, of course, then you should acquit him.

Now, the second count of the indictment, which is drawn under Title 22, Section 2902 of the District of Columbia Code, under which the second count, as I said, is drawn, reads as follows: Whoever attempts to commit robbery, attempts to commit robbery, as defined in Title 22, Section 2901, by an overt act shall be punished as provided by law.

Now, the second count of the indictment, which is drawn under the section of the Code I just read to you, reads as follows, and you will also have this before you in your jury room: That on or about August 13, 1962, within the District of Columbia, Nathan L. Drew, by means of an overt act -- now, what do we mean by an overt act?

An overt act is any act which the defendant might do pursuant to an attempt to commit the crime of robbery, and you have to decide whether or not he had that intent when he allegedly said, according to one of the witnesses, which is included in the indictment, and the indictment says he allegedly said or stated: Give me all your money.

Now, if you believe beyond a reasonable doubt that he said that to the witness mentioned in the second count, you must decide whether

or not when he said that, if you believe he said it, that he had the
253 intent to rob the woman, either by putting her in fear or by seizure or by snatching or any other means, and that as the count goes on to state, after saying, "Give me all the money," he did attempt by force and violence and against resistance and by sudden and stealthy seizure and snatching, to steal, take and carry away from and off the person and from the immediate actual possession of Mary C. Hughes, valuable money and property.

In other words, that charges an attempt to commit the crime of robbery as distinguished from the actual commission of the offense charged in the first count of the indictment.

You must be convinced that that overt act, that is, the words "Give me all the money," was an act pursuant to the intent that he had to commit the crime of robbery. It does not necessarily have to succeed.. All he had to do is have the intent, and he had to commit that overt act, and if you find beyond a reasonable doubt that he is the man, that is, the defendant, who had the intent at the time with the witness mentioned in the second count, which she said was an attempted robbery, and if you believe that beyond a reasonable doubt that he had in mind robbing her, or snatching the money, or any other means that he would use, then, of course, he would be guilty under that second count.

254 If you have a reasonable doubt in your mind as to whether or not he committed that crime, with the intent to do so, that is, the attempt to commit robbery, you would give him the benefit of that doubt and acquit him of that charge.

Now, in this case there has been some mention about a statement or an admission, or an admission or a confession, made by the defendant to one or more police officers. Now, the law admits a confession or admission or statement in evidence, whether it be oral or written, if the confession or admission is freely and willingly made, because human experience shows that a confession freely and willingly

made is likely to be relied on. Ordinarily a person does not admit that he has committed a crime unless the admission is true. This is the result of human experience.

The law does not, however, admit a confession that is obtained by duress or by coercion or by force or as the result of inducement. A confession obtained by these means must be disregarded and rejected by the jury. This rule too is based upon reason.

Human experience has shown that on occasion it has happened that persons have admitted the commission of a crime which they have not in fact committed in order to avoid or discontinue force, coercion, or duress being practiced upon them. Now, the force, duress, or coercion that I have referred to means both physical force and mental or moral pressure.

255 It is for you to determine and you determine this by all the facts and circumstances in the evidence, and I say it is for you to determine whether the confession of the defendant or admission was given voluntarily and without force, duress, coercion, or fear.

If you find that the confession was a voluntary one, you may consider it in evidence. If, on the other hand, you find that the confession was given because of force, duress, coercion or fear, you should consider it as being involuntary and should not then consider it as evidence against the defendant.

In considering whether the confession was or was not voluntary, you should consider the physical condition of the defendant and the facts surrounding his arrest and subsequent interrogation and all the circumstances surrounding the making of the alleged statement or confession.

Now, you must consider this matter deliberately and carefully in the light of the instructions on the law that I have given you. In reaching your conclusion, you must use the same common sense and the same approach and the same intelligence that you would employ in determining any important matter that you have to decide in the course of your own affairs.

As I stated to you in the beginning, an indictment is not evidence
256 against an accused, and should not be considered by the jury as evidence against the defendant.

Now, in considering the instructions that I have given you, you are to consider them in their entirety, that is, as a whole, and you should not select or pick out some particular construction and accentuate that and overlook the others, but you are to consider them, as I said, in their entirety.

Now, when you go to the jury room, of course, you will first there select your foreman or forelady, who will preside over your deliberations and give each one of you an opportunity to express your individual views regarding the evidence or any other thing you think is important in the case.

Now, if during the course of this trial, the Court, meaning myself, has done or said anything which has indicated or suggested to the jury or any member of the jury how the Court personally feels about this case, and the evidence in this matter, you must disregard that entirely, because I have not consciously or intentionally intimated or indicated how I personally feel about this case, whether I feel the defendant is guilty or not guilty. I have avoided that. However, if by any chance any of you, because of any ruling I might have made, or anything I might have said or done, has gotten such an impression, you must erase that entirely from your mind because, as you know,
257 you are the fact finders and you and you alone are the ones to determine the guilt or innocence of the defendant, of either one or both of these charges.

As I said, they are separate offenses, and there is no connection between the two.

You may find him not guilty or guilty of the first one; not guilty or guilty of the second charge; you may find him guilty of both charges or not guilty of both charges.

So those are the verdicts that you can reach in this case, and when

you have reached a unanimous verdict, that is, all twelve of you agree on the verdict, you will inform the Marshal, who will in turn inform the Court.

Now, in the event that it becomes necessary for the jury during its deliberations to send a note to the Court for any reason, please do not indicate in that note how the jury stands with respect to the guilt or innocence of the defendant, and also please do not say, for example, the jury stands ten to two for acquittal, or ten to two for conviction, on this count or that count, or eight to four for conviction or eight to four for acquittal, or however you might stand, because the Court will not be interested in how the jury stands, and if you did that, I might have to declare a mistrial.

You may send a note to the Court if you need further instructions or want to ask any questions, and if the Court thinks the question is proper, the Court will answer it. If the Court does not think the Court should answer the question, it won't be answered.

Now, all you have to do in this case, ladies and gentlemen of the jury, as you have done in every other case, or will do in every other case, is to use your good common sense. It is a very simple case on the facts, and approach this matter without any feeling of prejudice, bias, ill will, or sympathy, for either side. You are here to perform a certain function, and I am here to perform a certain function.

We are here to see that this defendant and every other defendant gets a fair trial according to the rules of evidence, and the burden of proof, as I said, is on the Government to prove each essential element of each count beyond a reasonable doubt.

If you have a reasonable doubt in your mind, you will acquit the defendant of either one or both of the counts. If you believe beyond a reasonable doubt that he is guilty of either one or both of the counts, that would be your verdict.

Will counsel approach the bench?

259 (Thereupon counsel approached the bench and the following occurred:)

THE COURT: Mr. Liff, I think I have covered everything in the charge.

Do you object to any part of the Court's charge, other than those objections you have already made and which are a matter of record?

MR. LIFF: I have made those objections, Your Honor.

THE COURT: All right, do you request any further instructions?

MR. LIFF: No, I don't, Your Honor. Of course, I do have -- I don't know if I have to renew them -- if I have my objections throughout the trial in both these cases, against both counts. I have those against both counts?

THE COURT: Yes, you do. They are a matter of record.

Do you have any objection to any part of the Court's charge?

MR. SIDMAN: No, Your Honor, the Government has no special requests.

THE COURT: All right. Well, then, both sides are satisfied.

(Thereupon counsel resumed their places in the courtroom and the following occurred:)

THE COURT: All right. Now, at this time the Court will excuse the two alternate jurors, Mr. Myers and Mr. Smith.

260 The Court wishes to express its deep appreciation to both of you for the services you have rendered. You have listened very carefully and attentively to the evidence, and I am sure you know the reason for your selection as alternates because sometimes it happens during the trial of a case, particularly in a long and protracted trial, that one or more of the regular jurors become disabled, or may have to go to a funeral, or something like that, or becomes ill, and then the alternate juror or jurors, who have heard all the evidence, are in a position to step into the place of the regular juror who is disqualified. So with that, the Court will ask you to return to the jury lounge, and thank

you very much for your services.

The jury will now retire to deliberate on its verdict.

(At 3:15 o'clock p.m. the jury left the courtroom to deliberate upon its verdict.

At 4:30 o'clock p.m. the Court and counsel returned to the courtroom and the following occurred:

THE COURT: Bring in the jury.

(Thereupon the jury entered the courtroom.)

THE DEPUTY CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: No, they have not.

THE COURT: Well, I am going to excuse the jury until tomorrow
261 morning at 10 o'clock. I will ask you to be back at 10 o'clock tomorrow morning, and please keep in mind the admonition of the Court, and that means everything I told you at the beginning of the trial.

(Thereupon at 4:32 o'clock p.m., an adjournment was taken until 10 o'clock a.m., on Wednesday, December 19, 1962.)

* * * * *

262 Washington, D. C.
December 19, 1962

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263 THE DEPUTY CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: They have.

THE DEPUTY CLERK: What say you as to the Defendant Nathan Drew on count 1?

THE FOREMAN: Guilty.

THE DEPUTY CLERK: Count 2?

THE FOREMAN: Guilty.

* * * * *

[Filed December 19, 1962]

On this 19th day of December, 1962, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, returns into Court at 10:00 A.M., and retires to resume their deliberation; whereupon the said jury upon their oath say that the defendant is guilty as indicted; and thereupon each and every member of the jury is asked if that is his or her verdict and each and every member thereof say that the defendant is guilty as indicted.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the district of Columbia Jail.

By direction of
JOHN J. SIRICA
Presiding Judge
Criminal Court #_____
HARRY M. HULL, Clerk
By /s/ Daniel J. Mencoboni
Deputy Clerk

Present:
UNITED STATES ATTORNEY
BY Barry Sidman
Assistant United States Attorney
Pat Mallon
Official Reporter

[Filed January 29, 1963]

JUDGMENT AND COMMITMENT

On this 25th day of January 1963 came the attorney for the Government and the defendant appeared in person and by counsel, Elliott H. Cole, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of ROBBERY and ATTEMPTED ROBBERY as charged and the court having asked the defendant whether he has anything to say why judgment should not

be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years to Fifteen (15) years on Count One; One (1) year to Three (3) years on Count two; said sentence on Count Two to run concurrently with the sentence imposed on Count One.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/s John J. Sirica
United States District Judge

The Court recommends that if required, the defendant be provided with psychiatric treatment.

Clerk

[Filed January 25, 1963]

AFFIDAVIT IN SUPPORT OF APPLICATION
TO PROCEED ON APPEAL WITHOUT PREPAYMENT OF COSTS

I, Nathan L. Drew, being first duly sworn, depose and say that I am the defendant in the above-entitled case; that in support of my application to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the nature of my appeal is briefly stated as follows:

Error to deny Motion for Pre-Trial Mental Examination.

Error to deny Motion for Severance.

Error to deny Motion for a New Trial.

I further have truthfully set forth below information relating to my ability to pay the costs of defending the case against me:

1. Are you presently employed? No.

   a. If yes, give the name and address of employer.

   b. If no, name and give date of last employment.

      Zircon Construction Co. - July, 1962 (approx)

2. How much cash do you have? None.

3. Do you own any bank account, savings account, stocks, bonds, automobile, real estate, or other valuable property? No. If yes, give details.

4. Do you have a wife, parent, or other person who may be able to assist you in paying the costs of your defense in this case? No. If yes, give details.

(Answers to #5 and #6 required only in criminal cases)

5. How much cash did you have at the time of your arrest? None.

6. Are you now free on bond? No. If not, do you intend to apply for bond? No.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

s/s Nathan L. Drew

[JURAT dated January 25, 1963]

Let the applicant proceed without prepayment of costs and with appointed counsel.

s/s John J. Sirica

DISTRICT JUDGE

[Filed December 24, 1962]

DEFENDANT'S MOTION FOR A NEW TRIAL

The defendant Nathan L. Drew, by and through his attorneys Charles P. Liff and Elliot H. Cole, hereby moves this Court to grant a new trial of the above-captioned criminal action which was tried beginning on December 17, 1962, and as reason therefor states the following:

(1) Failure of the Court to grant Defendant's Motion To Sever pursuant to Rule 14 of the Federal Rules of Criminal Procedure.

(2) That notwithstanding the verdict, there was established a reasonable doubt as to both counts of the indictment.

(3) That the prosecuting attorney made statements in his summation to the jury which related testimony given in connection with one charge to the second charge of the indictment in derogation of the Trial Court's instruction, which statements tended to mislead the jury into accepting as corroborative testimony as to one charge for purposes of arguing culpability of the second charge.

Accordingly, Defendant moves that new and separate trials be ordered by the Court in the interest of justice.

/s/ Elliot H. Cole

[Certificate of Service]

[Filed January 29, 1963]

January 28, 1963

Mr. James V. Bennett
Director
Federal Bureau of Prisons
101 Indiana Avenue, N.W.
Washington 25, D.C.

Re: DREW, Nathan Leon
Reg. #21212-NE

Dear Mr. Bennett:

The above-named paroloe was indicted in this Court on September 17, 1962 and charged in two counts with robbery and

attempted robbery. He was convicted by jury on both counts of the indictment on December 19, 1962 and the case was referred to this office for presentence investigation and report. Earlier, Drew had been released on parole from the U.S. Penitentiary, Lewisburg, Pennsylvania on December 8, 1956, where he had served slightly more than three years of a three (3) to ten (10) year sentence imposed in this Court on October 30, 1953 for housebreaking. Drew was under parole supervision with a full term expiration date of October 29, 1963 when convicted of the two new charges of robbery and attempted robbery. There is currently a parole violator warrant outstanding.

On January 25, 1963, Drew appeared for sentencing before Judge John J. Sirica of this Court. At that time, Judge Sirica imposed a sentence of from five (5) to fifteen (15) years on the robbery count and a sentence of from one (1) to three (3) years on the charge of attempted robbery with the two sentences being ordered to run concurrently. The Judge was desirous of implementing Section 4208(b), Title 18, U.S. Code in this case but, of course, was prohibited from doing so since the availability of this section is limited to U.S. Code offenses.

In imposing sentences upon Drew, the Judge recommended that the defendant be given benefit of a full psychiatric examination and evaluation in view of his bizarre behavior and history of crime dating back to 1950. In pointing out that he has sixty (60) days within which time to reduce the sentence as provided in Rule 35 of the Federal Rules of Criminal Procedure, Judge Sirica has requested that he be furnished with the psychiatric evaluation report in advance of this date. We are enclosing copies of the presentence report of October 21, 1953 and January 15, 1963.

Upon completion of the psychiatric examination and evaluation in this case, it would be appreciated if you would submit the report to this office so that it could be forwarded to Judge Sirica with an appropriate memorandum.

Very truly yours,

Edward W. Garrett
Chief U.S. Probation Officer

By: s/James D. Morgan
U.S. Probation Officer

[Filed January 31, 1963]

Office of the
PROBATION OFFICER
United States District Court
For the District of Columbia

* * * * * *

January 30, 1963

MEMORANDUM TO THE HONORABLE JOHN J. SIRICA

Re: DREW, Nathan L.
CC# 771-62

Your Honor will no doubt recall that after sentence was imposed upon the above-named defendant on Friday, January 25, 1963, the Court requested that we make arrangements for Drew to undergo a psychiatric examination and evaluation. We directed a letter to Mr. James V. Bennett, Director, Federal Bureau of Prisons, on January 28, 1963, requesting that this examination be made within sixty days and a report be submitted back to the Court.

Today, January 30, 1963, a representative of the Bureau of Prisons telephoned me to advise that arrangements were being made to transport Drew to the U.S. Penitentiary, Lewisburg, Pennsylvania, for the psychiatric evaluation. Upon contacting the D.C. Jail, however, it was learned that Drew had noted an appeal from the judgment and

conviction of this Court and made the election not to begin the service of sentence pending the appeal. In view of this occurrence, the Bureau of Prisons cannot take custody of defendant Drew and is therefore unable to conduct the psychiatric evaluation. We might point out that a parole violator warrant is outstanding against Drew and it is not likely that he could be admitted to bond pending the appeal.

Respectfully submitted,

/s/ James D. Morgan
U.S. Probation Officer

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,611

NATHAN L. DREW,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from a Judgment of the United States District Court
For the District of Columbia

HAROLD LEVENTHAL

Ginsburg & Leventhal
One Farragut Square South
Washington 6, D. C.

Attorney for Appellant
Appointed by the Court

May , 1963

QUESTIONS PRESENTED

1. Whether there was prejudicial error in maintaining a combined trial of the charges of robbery and attempted robbery where -

(a) the offenses were separate and distinct felonies, committed at separate times, not provable by the same evidence, and proof of one could not have been admissible in a trial held solely on the other;

(b) the offenses were such that they might lead the jury to consider that they are corroborative of one another when no such corroboration exists;

(c) the prosecuting attorney in his summation improperly linked the two separate identifications cumulatively;

(d) there was some confusion of the two offenses in the testimony; and

(e) defendant was required to forego taking the stand to reinforce testimony as to his presence elsewhere at the time of the robbery in order to avoid forfeiting his right to rest on the prosecution's case as to the attempted robbery without taking the stand.

2. Whether the Court erred in denying a mistrial after the prosecutor in substance called the jury's attention to defendant's failure to take the stand,

particularly in view of the prior defense motions stressing the importance of that right in this case.

3. Whether the Court erred in not requiring a pre-sentence psychiatric examination and evaluation, the Court having determined instead to make a request, after imposing sentence, that a psychiatric evaluation report be provided within 60 days -- a request which lapsed when arrangements therefor with the Bureau of Prisons could not be completed because defendant elected not to serve his sentence pending appeal.

SUBJECT INDEX

TABLE OF CASES

Table of Cases (Continued) Page

STATUTES AND RULES INVOLVED

MISCELLANEOUS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,611

NATHAN L. DREW,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from a Judgment of the United States District Court
For the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

An indictment was returned against appellant on September 18, 1962, count one charging robbery in violation of 22 D. C. Code sec. 2901, and count two charging attempt to commit robbery in violation of 22 D. C. Code sec. 2902. District Court, on a jury verdict of guilty on both counts, entered the judgment and commitment dated January 25, 1963, providing for imprisonment from 5 to 15 years on count 1, and from 1 to 3 years on count 2, sentences to be served concur-

rently. Notice of appeal was timely filed. Appellant has obtained leave to proceed in forma pauperis.

The jurisdiction of the District Court is established by 11 D. C. Code sec. 306, and 24 D. C. Code sec. 401. The jurisdiction of the Court of Appeals is established by 28 U. S. Code sec. 1291.

STATEMENT OF THE CASE

1. The indictment against appellant Nathan L. Drew was in two counts. The first count charged that on July 27, 1962, by force and violence and putting in fear, etc., he took from Mary M. Waley $50 belonging to High's Dairy Products Corp. The second count charged that on August 13, 1962 he attempted by force and violence and putting in fear, etc. to take money from the possession of Mary C. Hughes.

2. Motions for severance were made by defense counsel, both before and at the beginning of trial, on the ground that the defense would be prejudiced in being denied the right to defend himself by taking the stand as to one charge and not the other; that the charges involved two distinct and unrelated events with different sets of witnesses and should not be tried together; that the identification by different witnesses for each charge would influence jurors as tending to corroborate each other; and that there would be difficulty in separating out the evidence in these cases (Tr. 16-7). The Assistant United States Attorney argued "that there is one continuation as to both crimes" (Tr. 18). The motion was denied (Tr. 18).

3. Testimony of prosecution witnesses

MARY M. WALEY: On July 27, 1963 I was working for High's Dairy Products at the 5317 East Capitol Street, N. E. store at about 4 p.m. when the store was robbed. Before the robbery I was in the milk box, stocking the shelves and saw a man (later identified as Drew) enter the store. I continued to stack the milk on the shelves for approximately five minutes before I came out. I could observe the man who had entered; he was standing and waiting. I eventually came out and asked, May I help you? He answered, This is a holdup, I want your money, all of it. He kept one hand in his pocket. I was frightened and did nothing for a minute or two, then he said: Get it, and pulled a gun partly out of his pocket, enough for me to see it. I gave him $50 from the drawer. I saw him again on August 13, when I picked him out of a lineup of six men in No. 14 Precinct (Tr. 30-35).

Cross-examination: The robbery was on July 27. The milk box was in back of the store. When I heard the door open I went up to a glass showcase to see who was out front, so I could go out and wait on the customer. But then I didn't go right away because I thought I would put several more bottles on the shelf. I put five or six more bottles, which I took from a box on the floor to put on the shelves. Q: It took you five minutes to put six bottles on the shelf? A: It was time for my lunch, and I wasn't in a particular hurry to go out on the floor, so by then I was stretching around in the

box, looking out front, and trying to wait for someone else to go out. Q: You waited five minutes to go out? A: I wasn't in a hurry to go out; approximately, it could have been six (Tr. 37-41).

In the lineup there were five or six men. They were not all of the same height as Mr. Drew; they were of different heights. Q: Did you see anybody in the lineup of the same height as defendant? A: Yes. (Tr. 42-45.)

When I identified Mr. Drew in the lineup he had on a long coat, hat, and sunglasses. The man in the store was wearing sunglasses. I identified Drew with and without the sunglasses. I had never before seen him without sunglasses. I didn't know what his eyes looked like; I didn't see his eyes; I saw him (Tr. 46-47).

Q: Are you sure of the date of the robbery? A: Yes. It is impossible to forget it. Q: What day of the week? A: I don't know but it was on the 27th. It wasn't necessary for me to remember the day, so long as I know the date. Q: Who told you it wasn't necessary? A: I told myself (Tr. 50-51).

Redirect: There is no doubt in my mind that Drew was the man who came in the store (Tr. 51).

ROLAND TWOMBLY: I am store supervisor for High's. It operates stores at 5317 East Capitol Street and at 5119 Grant St. (Tr. 53-4).

PAUL SMALLWOOD: When I went into High's Capitol St. Store on July 27, I saw a man coming out but I did not see his face. (Tr. 55-7.)

MRS. MARY HUGHES: I was working for High's at 5119 Grant Street, N.E., on August 13, 1962. Nobody else was working with me. At approximately six o'clock a man (later identified as Drew) came in. I asked what are you having, and he said, a bag of peanuts. I asked what size, 5 or 10. He said, Five. He never did give me the five cents. And he said: Give me all the money. I said: If you want it, come and get it. And he kept repeating the same thing, and so did I, and a customer walked in and he went out. He was in the store 3 or 4 minutes before she came in. I went to the phone, called the 14th Precinct and I gave them a description of the man. I saw Drew again at the store with a policeman. I don't know the name of the woman customer. (Tr. 58-63.)

Cross-examination: About 10 minutes after I phoned, not over 15, the police came to the store. I told them about it again. About 10 or 15 minutes elapsed between the time they went out from the store and returned holding on to a man. The total elapsed time between the man leaving the store and coming back with the policeman was 25 minutes. (Tr. 63-67.)

I knew what kind of coat the man had on, and hat, but didn't notice his pants. He had on a little cap and sunglasses. When he was brought back in he didn't have on glasses. Q: You identified him without the glasses? A: Yes, I did. (Tr. 66-7.)

Q: He didn't do anything. He didn't threaten you in any way? Objection. Overruled. Q: He just asked

for it, and you said No, and he asked for it again, is that correct? And that kept on for 3 or 4 minutes? A: Until a customer came in. He said, You are not going to give me that money? And I said: No, if you want it, come and get it. (Tr. 68-69.)

Redirect examination: It was about 3 or 4 times that he said: Give me the money. And I said: If you want it come and get it. And the last time he said: You are not going to give me that money? And I said: No, you have to come and get it. (Tr. 72.)

DETECTIVE CARLTON ROGERS: I was assigned to 14th Precinct on August 13, 1962. Q: Did you have occasion on that day to investigate a robbery. A: I did. Q: Where did the robbery take place? A: At High's 5119 Grant St. Store. Drew was brought to 14th Precinct by Officer Olds and booked at 5:45 p.m. I questioned him as we finished getting the information for our arrest book. (Tr. 72-74.)

4. Inquiry as to possibility of limited appearance by defendant. On request of defense counsel, the jury was withdrawn. A hearing was held, out of the presence of the jury, on defendant's alleged confession. After prosecution presented its evidence, defense counsel inquired whether, if defendant takes the stand on the issue of confession it would be held he has taken the stand for all purposes, or would it be restricted to this issue. The court declined to state what ruling it would make at a future time. Defense counsel asked

whether the Government would stipulate that it would waive right to call defendant to stand for all other purposes. This was not stipulated. (Tr. 136-7.) The court overruled the defense objection to testimony as to the alleged confession.

5. Resumption of prosecution testimony.

ROGERS: Drew was booked about 5:55. He was taken upstairs so that we could get his name and address and information for the lineup sheet and processing through Identification Bureau. At 6:10 I held a lineup of five men, including defendant. He was identified by Mrs. Waley. (Tr. 138-9.)

After the lineup, Detective Chaplin and I took him to an adjoining room and talked to him. No promises or threats were made. "We asked him if he had did this robbery in the attempt and he said he did, but there would be no need for us to write it down as when he got to court he would have to deny it." Q: Did you ask him about both the robbery on July 27 and the attempt on August 13? A: That is right. Q: Was his denial -- was the statement made with reference to both of them? A: Both, both the attempt and the robbery. Objection. The Court: Just give the conversation you had with him. (Tr. 139-141.)

The warning and advice that he did not have to give a statement was given to defendant when he was taken upstairs to our office, when I told him that he had been identified as the person who had attempted to hold up a

High's store, and that we had called another victim of a robbery, and he could give a statement but under the law he didn't have to. (Tr. 141-142.)

Cross-examination: The lineup had five men, including defendant. I would say they were of the same build and height as defendant -- and approximated him. We got them as close to the height of defendant as we could. There would be some variation in height but not considerable. (Tr. 144-145.)

I don't recall whether I advised him of his right to have counsel. (Tr. 146.)

Detective Chaplin asked him to apologize to the lady and he refused. Q: And despite this refusal he confessed, as you say he did. A: He did. Our procedures call for a written confession when we can. I did not ask him to put it in writing. Defendant told me there would be no need to put it in writing because he would have to deny it in court. (Tr. 147-148.)

OFFICER JESSE B. WILLIAMS: On August 13 I drove my scout car near 5119 Grant Street, N. E. because of robbery there and radio lookout giving description of person and clothing. I saw a person (later identified as Drew) matching that description of clothing about 25 yards away from that location. He said he was coming from his girl friend's. He had his hat off, and he was perspiring. I asked him to go back with me to the High's store where a robbery had occurred. I encountered Officer Olds, told him Drew fit the description and turned Drew over to Olds.

(Tr. 149-153.)

Cross-examination: When I first observed defendant he was walking along the street, hat in hand, walking normally; he was then about 25 yards from High's store, about 25 man's size steps. He didn't try to evade me or break into a run. I didn't have to hold or touch him. I said would you mind coming to the store and we turned around. He wasn't panting. It was one minute from the time I accosted him until I turned him over to Olds in front of store. (Tr. 154-9.)

VERNICE ROSS: As I came into the High's Grant St. store late afternoon of Aug. 13 a man came out. I didn't pay any attention. I thought he was a customer. I could not identify him. Mrs. Hughes was in the store. (Tr. 163-4.)

OFFICER DANIEL R. OLDS: Answering a scout car call I went to 5119 Grant St. Williams turned Drew over to me. I took him in the store where he was identified by Mrs. Hughes. She said she wasn't sure, he was wearing sunglasses, and I asked him to put on his glasses, and she said, That is him. (Tr. 167.)

Cross-examination: They turned Drew over about 20 yards from the store. I asked Mrs. Hughes to identify him. She said she wasn't sure, it looked like him, he had been wearing dark glasses. When he put on dark glasses she identified him. But without the glasses she wasn't sure. And this uncertainty was there even though it was on the same day. (Tr. 171-172.)

Q: Was there anyone else in the store? A: I believe there was someone else in the back and she came out, I'm not sure. I might be mixed up with the other High's store, I'm not sure. (Tr. 172.)

When I turned Drew over at the station, I said Mrs. Hughes identified him. I don't remember telling him that in the store. (Tr. 175.)

6. Testimony of defense witness Theresa Powell. On July 27 Drew came to my house and rented a room. I remember this because we had recently returned from a niece's funeral in North Carolina and that same Friday -- my husband's pay day -- he said Nathan was coming, and he moved in that day. Drew came between 2 and 2:30. I told Nathan he would have to wait until my husband came home. That was about 4. He stayed there until 7 p.m. He left that evening about the same time we went to my mother's house. I knew Drew before that day. He lived at my house for about 3 weeks. (Tr. 177-180.)

Cross-examination: I don't usually take roomers. I rented to Drew because he was a friend of my husband's cousin. He and that cousin stayed with us a couple of months the first part of last year. He stayed in an extra room. (Tr. 181-3.) When my husband came in he and Drew did some shifting of beds, in the bedroom, took a bed out of the closet for Drew to use, and then drank beer until 7 p.m. when my family went to my mother's. (Tr. 187-8.)

I first learned of Nathan's arrest when his brother

came around around September 18 to pick up his clothing, but he told me nothing about the case. (Tr. 192.) The first time I spoke to anyone about the events of July 27 was when Mr. Cole came to see me last month. (Tr. 190-191.)

7. Detective Rogers recalled by defense: I questioned defendant at station house before and after the lineup. When I was through questioning him I made out reports. Each of the reports reflects a statement by defendant: "Defendant denies this offense." (Tr. 196-197.)

Cross-examination by prosecution. The defendant later admitted the offense - after the lineup. (Tr. 199.)

Redirect examination by defense counsel. The oral admission after the lineup was made before this statement was typed, but no reference was made thereto in the statement. (Tr. 200.)

Recross-examination by prosecution. Q: Why wasn't the defendant's oral statement in the report? A: "It was an oral statement and need not be put in this statement of facts." The next day I filled out a form regarding oral admissions. (Tr. 201-2.)

8. Summation by prosecution. In his summation, the Assistant United States Attorney argued to the jury that after defendant was booked for the attempted robbery, Detective Rogers noted similarity in events of July 27 and August 13 and called Miss Waley to view a lineup. Later, in the summation, he argued (Tr. 213): "There is

nothing that was produced to you, testimony before you, to the effect that the statement was not voluntarily made. In a case where there are two crimes, where there are several witnesses who identify defendant clearly..."

Defense counsel moved for a mistrial. This was denied, the court stating that the jury understands and will disregard it, that he will instruct them there's no duty on defendant to take the stand. The court cautioned the prosecuting attorney to avoid arguing that there is no denial or evidence to refute the admission. The court overruled the defense contention of prejudice on the ground that the prosecution had tied the two offenses together and had referred to the testimony as to one offense as tending to support the proof of the other. (Tr. 213-15.)

At another point when defense counsel objected that prosecution counsel was conducting summation in such a way as to tie the two offenses together, the court said he would instruct the jury that there is no connection between the two separate and distinct offenses. (Tr. 238-9.)

9. Instruction. The court charged that there is no connection whatsoever between the two separate offenses, although he is charged, and he has a right to be charged that way, but the Government must prove beyond a reasonable doubt as to each one of offenses. (Tr. 244-246.)
The Court also charged that defendant's failure to take the stand gives rise to no inference. (Tr. 244.)
The Court gave the standard charge that in determining

whether the Government established the charges beyond a reasonable doubt, you must consider and weigh the testimony of all the witnesses who appeared. (Tr. 248.)

10. Jury deliberation and verdict. The jury did not agree on verdict between 3:15 and 4:30 p.m. and was releated to return next morning at 10:00 a.m. At 11:15 a.m. they announced the verdict of guilty on both counts. (Tr. 262-3.)

11. Post-trial motion and sentencing. The Court denied defendant's motion for new trial which presented again the claim of prejudice from joinder of offenses. The Court file [1/] discloses that on January 25, 1963 the trial judge imposed a sentence of from 5 to 15 years on count one, the robbery count, and imposed a sentence of from 1 to 3 years on the charge of attempted robbery, and ordered that the two sentences run concurrently.

Judge Sirica at first desired to implement 18 U.S.C. §4208(b) but this was unavailable since it is limited to offenses under the U. S. Code. In imposing sentence, the Judge recommended that defendant be given benefit of a full psychiatric examination and evaluation in view of his bizarre behavior and history of crime

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1/ Although there is no transcript of the proceedings on January 25, a full account thereof is provided by copies of letters from the Probation Officer to the Director of the Federal Bureau of Prisons, January 28, 1963, and the memorandum of the Probation Officer to the trial judge January 30, 1963, which are the foundation for this portion of the statement of the case.

dating back to 1950. After sentence was imposed the Judge requested the Probation Officer to make arrangements for the defendant to undergo psychiatric examination and evaluation and further requested that he be furnished with the psychiatric evaluation report within 60 days, the time limit provided by Rule 35 for reduction of sentence by the trial judge.

On January 30, 1963, the Probation Officer wrote a memorandum to the Trial Judge advising that arrangements had been made to transport Drew to the U. S. penitentiary at Lewisburg, Pennsylvania for the purpose of psychiatric evaluation, but that on contacting the D. C. Jail it was learned that Drew had noted an appeal and had made the election not to begin service of the sentence pending the appeal, rendering the Bureau of Prisons unable to take custody of the defendant and, therefore, unable to conduct psychiatric evaluation. On January 31, this memorandum was filed in the jacket of the case.

As already indicated, appellant timely filed a Notice of Appeal.

RULES INVOLVED

Federal Rules of Criminal Procedure

Rule 8. Joinder of Offenses and of Defendants

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

* * * * * * *

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT OF POINTS

The Court below erred:

(1) In denying defendant's motion for severance of trial on Counts 1 and 2.

(2) In denying defendant's motion for mistrial made during prosecution's summation -- in view of the fact that the prosecuting attorney improperly:

(a) commented on defendant's failure to take the stand; and

(b) combined summation on the two counts as to prejudice defendant by the joinder.

(3) In denying defendant's motion for new trial in view of the prejudice from joinder of offenses, and the prejudice from prosecutor's summation.

(4) In imposing sentence without obtaining a psychiatric examination and evaluation of defendant.

SUMMARY OF ARGUMENT

I

Judgment should be reversed because of the prejudice resulting from maintaining joinder for trial of the offenses of robbery on July 27, 1963 and of attempting to commit robbery on August 13, 1962.

A. Appellant submits that a defendant is prejudiced by the joinder of offenses whenever, as in this case, the offenses are separate and distinct felonies, committed at different times, not provable by the same evidence, where proof of one would not have been admissible in a trial held solely on the other, and where the offenses are such that they might lead the jury to consider that they are corroborative of one another when no such corroboration in fact exists.

The prejudice from such joinder consists "in the matter of being held out to be habitually criminal" (McElroy v. United States, 164 U.S. 76, 79) and in the prejudice that results where the felonies are such that "the jury might regard one as corroborative of the other when, in fact, no corroboration exists." Kidwell v. United States, 39 App. D.C. 566 (1912).

A similar principle underlines the rule of evidence excluding testimony of the commission of similar offenses. Such testimony is excluded because any benefit of relevance is outweighed by the disadvantages of unfair

prejudice from the creation of hostility to the defendant, and from its tendency to be given undue weight by the jury. Exceptions to the exclusionary rule appear in certain types of cases where there is such direct materiality and relevance to a substantive element of the offense that it outweighs the prejudice. In general the exclusionary rule stands as a fundamental aspect of the jealous regard for the liberty of the individual which distinguishes Anglo-American jurisprudence. The unfair creation of hostility to the defendant supports the exclusionary rule even in a case where the problem of confusion of issues is not significant.

In this particular case, the circumstances were such that a jury might well have regarded the testimony of one offense as corroborative of the other, both charges involving a daylight robbery or attempted robbery of a High's Ice Cream Store.

As to the robbery of the Capitol Street store on July 27, 1962, the prosecution's proof beyond a reasonable doubt had to be such as to overcome Mrs. Powell's testimony accounting for defendant's presence elsewhere at the time involved.

There were problems with the prosecution's proof as to the identification of defendant for this offense made by the complaining witness. She did not pick him out of a lineup until three weeks later. She testified that the men in the lineup were of different heights. Her testimony purporting to establish her opportunity to observe

the robber was curious and unsatisfactory, that she kept him waiting for 5 or 6 minutes in the store while she stacked 6 bottles of milk.

The prosecution was able in effect to finesse the difficulties in the identification of the Capitol Street robber by the testimony of the dramatically quick identification of defendant in the case of the subsequent attempted robbery at the Grant Street store. Separately considered, there were difficulties with this second identification. Defendant was picked up 20 minutes after the offense about 25 yards from the store while walking normally. The police officer testified he acted because of the description of his clothing on the radio lookout. Yet a minute later the complaining witness was unable to identify defendant at first and did not resolve her uncertainty until he put on dark sunglasses.

Prejudice is not to be obviated on the theory that the jury was not supposed to consider the evidence of the second identification in weighing the identification and defense as to the first offense. It is dubious whether a jury can disregard testimony when instructed to disregard the testimony entirely in the course of its deliberation. Justice Jackson called this a "naive assumption" tantamount to "unmitigated fiction." But to hypothesize that in the same session a jury will first carefully weigh all the elements of a line of evidence and then completely, but temporarily, disregard that same evidence, is to carry fiction to the point of fantasy.

The prosecution's summation critically heightened the prejudice. The prosecuting attorney stated, without support in the testimony, that the detective noted the similarity in events and telephoned the first complaining witness to come to the lineup. Such association, through permissible as a matter of investigative technique, does not justify linkage together in the course of a combined trial before a jury.

The prosecuting attorney skillfully blended the two lines of evidence by arguing that this "is a case where there are two crimes, where there are several witnesses who identified defendant clearly." If prosecuting attorneys insist on trying unrelated offenses together, they have a duty to be scrupulous in summation in separating out the testimony on each offense. Failure to maintain this separation calls for a mistrial. The Judge's comment that he did not care what Government counsel said, and would tell the jury these are two separate crimes, could not in fact, and did not, obviate the prejudicial error.

B. There were further sources of prejudice from the joinder of offenses at the trial.

There was confusion of the offenses at the trial, e.g., in the testimony of a police officer who confused the facts of one offense with another. And there were various references, by police witnesses, the prosecuting attorney, and the Court, to the second offense as a robbery or another robbery, instead of an attempted

robbery.

Defendant was particularly subjected to prejudice in that he could not exercise a fundamental right to take the stand as to one offense while declining to take the stand as to the other offense. Defendant did not take the stand. If the robbery offense had been tried alone, he would have been able to reinforce the testimony of Mrs. Powell as to his presence elsewhere on July 27. He was prejudiced in his robbery defense by his inability to take the stand without forfeiting his right, as to the charge of attempted robbery on August 13, to rest on the prosecution's proof without taking the stand.

II

A police officer testified that defendant had made an oral admission after the lineup. Appellant's counsel impeached his testimony by eliciting on cross-examination that a written report made by the police officer shortly after allegedly hearing the oral admission made no reference thereto but simply stated only: Defendant denies the charge.

In summation, the prosecuting attorney argued: "There was nothing that was produced to you, testimony before you to the effect that the statement was not voluntarily made."

This was improper as constituting in substance an argument that defendant had failed to take the stand. White v. United States, 314 F.2d 243.

The prosecuting attorney was under clear notice that defense counsel had asserted prejudice from the joinder of offenses in the inability to put defendant on the stand for one offense but not the other, and had sought in vain to obtain a court ruling or stipulation to limit the purpose for which defendant could be put on the stand.

Under the circumstances, the prosecutor had a particular duty to avoid any summation that would even by implication comment on the defendant's failure to take the stand.

The Court was sensitive to the problem and cautioned the prosecuting attorney to avoid arguing that there is no denial or evidence to refute the alleged admission. But he denied mistrial on the ground that this would be disregarded by the jury, who would be instructed that defendant is under no duty to take the stand. That instruction was duly given but it did not cure the prejudicial impact of the summation of the prosecuting attorney.

III

On imposing sentence the judge recommended that defendant be given the benefit of a full psychiatric examination in view of his bizarre behavior and history of crime, and requested that the psychiatric evaluation report be furnished to the Court within 60 days, the time available under Rule 35 to reduce the sentence.

The probation officer made arrangements with the Bureau of Prisons to conduct such an evaluation, but then advised the judge that such evaluation by the Bureau of Prisons could not be provided in view of the fact that defendant had noted an appeal and made the election not to begin service of sentence pending the appeal. It was error for the sentencing judge to have pronounced sentence without availing himself of the facilities available in the District of Columbia for a pre-sentence psychiatric examination and evaluation. Leach v. United States, No. 17,459, decided April 25, 1963.

ARGUMENT

I. THE JUDGMENT SHOULD BE REVERSED BECAUSE OF PREJUDICE RESULTING FROM MAINTAINING JOINDER OF THE TWO OFFENSES FOR TRIAL

Denial of the severance sought by defendant resulted in a trial combining the offense of robbing one store on July 27, 1962, with the offense of attempting to rob another store on August 13, 1962. Counsel for defendant presented (a) motions for severance before and at the beginning of the trial; (b) motion for mistrial during the summation by the prosecution; and (c) motion for new trial -- all based on prejudice anticipated or experienced from lack of severance. All such motions were denied. Defendant was thereby prejudiced and this Court should order new trials with the offenses separated.

A. Prejudice Resulted From the Combination for Trial of Separate and Distinct Felonies Not Provable by the Same Evidence, Which the Jury May Have Regarded as Corroborative of Each Other, Where Direct Proof of the Two Offenses Could Not Have Been Introduced Before the Same Jury if the Trials Had Been Separated

Rule 8(a) of the Federal Rules of Criminal Procedure clearly permitted the two offenses to be joined together since they "are of the same or similar character" but Rule 14 provides that defendant shall be given relief if he is "prejudiced by a joinder of offenses" either by an order for separate trials or other relief.

At the motion argument the prosecuting attorney claimed "there is one continuation as to both crimes" (Tr. 18). No evidence to that effect was introduced and the evidence showed the two alleged offenses were entirely unrelated.

Appellant submits that a defendant is prejudiced by a joinder of offenses whenever the offenses are separate and distinct felonies, committed at different times, not provable by the same evidence, where proof of one would not have been admissible in a trial held solely on the other, and where the offenses are such that they might lead the jury to consider they are corroborative of one another.

1. Review of Applicable Precedents and Legal Principles

a. We turn first to the precedents prior to the adoption of the Federal Rules of Criminal Procedure. These are applicable since Rules 8(a) and 14 were a restatement of existing law under 18 U.S.C. former sec. 557 and cases decided thereunder. See Notes of the Advisory Committee on Rules as set forth in the Annotations to Rules 8 and 14 in the United States Code Annotated.

Prior to any statutory enactment on the subject, the Supreme Court held, in an opinion by Justice Story,

that the common law governed the right to separate trials, the court to exercise its sound discretion "with all due regard and tenderness to prisoners, according to the known humanity of our criminal jurisprudence." United States v. Marchant and Colson, 12 Wheat (25 U.S.) 480, 485 (1827).

By an 1853 Statute, [2/] codified first as Revised Statutes sec. 1024, and later as 18 U.S.C. sec. 557, Congress permitted joinder of counts in one indictment in the case of charges based on the same act or transaction or two or more connected acts or transactions, or when several charges are made against the same person "for two or more acts or transactions of the same class of crimes or offense which may properly be joined."

This statute "was intended to abrogate the technical rules of the common law on the subject."

2/ Act of February 26, 1853, c. 80, §1: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offense, which may properly be joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated.

See Kidwell v. United States, 39 App. D.C. 566, 570 (D.C. Cir. 1912), quoting Dolan v. United States, 133 Fed. 440 (8th Cir. 1904). Although it authorized some consolidation which would not have been permitted at common law (see Kidwell), the statute was not intended to curtail any substantial rights of the defendant. On the contrary, it was probably designed to regulate the filing of an unusually large number of indictments against a defendant.[3/] See United States v. Silverman, 106 F.2d 750, 751 (3d Cir. 1939).

It "leaves the court to determine whether, in a given case, a joinder of two or more offenses in one indictment against the same person is consistent with the settled principles of criminal law". See Pointer v. United States, 151 U.S. 396, 400 (1894), cited in the Notes of the Advisory Committee on Rules set forth in the U.S.C.A. Annotation to Rule 14.

3/ "Common law practice in England permitted the filing of an excessive number of charges against a defendant alleging one crime to have been committed by various means. This practice was due at least in part, according to Stephen, to the fact that officers who drew indictments received a fee for each count in the indictment." Second Preliminary Draft of the Federal Rules of Criminal Procedure with Notes (Govt. Printing Office, 1944) p. 33.

Pointer held that no substantial rights of the accused had been prejudiced by being compelled to go to trial on charges in different counts of two murders where, as Justice Harlan pointed out, the evidence showed that the two murders were committed at the same place, on the same occasion, and under such circumstances that the proof in respect of one necessarily threw light upon the other; and that "there was such close connection between the two felonies, in respect of time, place, and occasion, that it was difficult, if not impossible, to separate the proof of one charge from the proof of another" (p. 404).

Two years later in McElroy v. United States, 164 U.S. 76 (1896) the Supreme Court, two judges dissenting, reversed convictions of a group of six defendants who were tried on consolidated indictments for feloniously firing the dwelling house of one person on April 16, 1894, charged as assault with intent to kill, and for arson committed May 1, 1894, in respect of the home of another person.[4/] Chief Justice Fuller stated (p. 79):

4/ The Court also held, on concession of the government and no judges dissenting, that it was error to consolidate either of these indictments with another indictment lodged against some but not all the defendants.

> ". . . in our opinion they [the indictments] were not for two or more acts or transactions of the same class of crimes or offenses which might properly be joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence. In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the inductment to one distinct offense or restrict the evidence to one transaction. (Emphasis added.)
>
> * * * * * *
>
> ". . . we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts."

The Court held that it could not say that the defendants were not embarrassed and prejudiced by the joinder, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions.

In Kidwell v. United States, 39 App. D.C. 566 (1912) this Court reversed a conviction upon an indictment in two counts each charging carnal knowledge with a different female minor. Justice Van Orsdel stated (p. 570):

"We are in accord with this holding, to the effect that while the crimes here charged in the separate counts are of the same class, it still remained for the court to determine whether the charges were of such a nature as, by consolidation, to confound or embarrass defendant in making his defense. The offense charged in the first count is alleged to have been committed more than six months before that charged in the second. It is doubtful whether separate and distinct felonies, involving different parties, not arising out of the same transaction or dependent upon the same proof, should ever be consolidated. But it should not be permitted where the crimes charged are of such a nature that the jury might regard one as corroborative of the other, when, in fact, no corroboration exists. While consolidation for trial under this statute is within the discretion of the trial court, where there is an abuse of that discretion in a criminal case an appellate court will not hesitate to correct it." [Emphasis added.]

b. The Kidwell case considered that prejudice inheres in the trial together of unrelated felonies which could be viewed cumulatively by the jury where "the jury might regard one as corroborative of the other when, in fact, no corroboration exists". This is related to the prejudice sustained in the trial of a single offense when evidence of defendant's commission of similar crimes is offered by the prosecution and received. The possibility of prejudice from joinder was dispelled by a consideration and determination in various cases that in the particular circumstances the evidence of one offense would have been admissible in a trial of the other offense. Means v. United States,

62 App. D.C. 118, 65 F.2d 206, 7 (1933); McNeil v. United States, 66 App. D.C. 199, 85 F.2d 698, 703 (1936); United States v. Perlstein, 120 F.2d 276, 280-1 (3d Cir. 1941).

But where the evidence of one offense would not have been admissible in a trial of the other offense, prejudice from joinder lies in the possibility that evidence of one offense may be taken by the jury to supply deficiencies in the direct proof of the other offense and in the tendency of the defendant's "being held out to be habitually criminal" (see McElroy and Perlstein) and hostility thus generated. 5/

5/ "Frequently, the mere fact of accusing him of several things was supposed to tend to insure the probability of his being found guilty, as it amounted to giving evidence of bad character against him. Blackburn, J., in Castro v. Queen, 1881, 6 App. Cas. 229.

"I pause here to express my decided opinion that it is a scandal that an accused person should be put to answer such an array of counts containing as these do several distinct charges. Though not illegal, it is hardly fair to put a man upon his trial for such an indictment, for it is almost impossible that he should not be grievously prejudiced as regards each one of the charges by the evidence which is being given on the others. Hawkins, J., in Queen v. King (1897) 1 Q.B.D. 216."

c. The principle of Kidwell and other cases, providing relief from joinder of offenses even where authorized by statute, is fully applicable under Rule 14. Rule 14 was precisely intended to provide for that relief from prejudicial joinder which Kidwell and other decisions had derived from the statutory phrase authorizing joinder of charges "which may properly be joined". 6/ Thus, Rule 14 obviated the force of fears which were voiced that omission of this clause from Rule 8(a) might result in joinder of unrelated offenses prejudicial to the defendant. See Orfield, "Joinder in Federal Criminal Procedure," 26 F.R.D. 23, 27, 28 (1960); Maguire, "Proposed New Federal Rules of Criminal Procedure", 23 Ore. L. Rev. 56, 58 (1943).

6/ See Note of Advisory Committee to the Rule, then Rule 13, Second Preliminary Draft, Federal Rules of Criminal Procedure (Govt. Print. Office, 1944) p. 69:

> "This rule states substantially the present federal law concerning relief from prejudicial joinder.
>
> "It is based in part upon the interpretation of a clause in 18 U.S.C. Sec. 557 (Indictments and presentments; joinder of charges). That clause, namely, 'which may be properly joined' has been interpreted to mean that determination is within the discretion of the trial judge in regard to whether or not a fair trial will be prevented by the joinder of offenses or of defendants in the courts of an indictment or resulting from a consolidation of indictments even though the joinder or the consolidation is authorized by the statute."

d. It is submitted that an unsound strain was injected into the judicial discussion by United States v. Lotsch, 102 F.2d 35 (2d Cir. 1939). This focused as the sole criterion of prejudice on the question whether "the trial as a whole may . . . become too confused for the jury". It found no prejudice where the evidence as to each offense is simple enough so that the jury could keep separate what evidence was relevant to what offense.

On analysis it appears that the limited Lotsch conception of prejudice from the joinder of separate crimes resulted from the view of the court limiting the purpose and significance of the rule of evidence prohibiting introduction of evidence of similar crimes or offenses. The court concluded that the exclusionary rule of evidence has no significance in terms of rational relevance, since criminal disposition is a "convincing factor," that it rests only on the problem of making the trial of issues manageable as a practical matter (102 F.2d at p. 36).

This Court, contrary to the Lotsch analysis, regards the pertinent rule of evidence as a fundamental rule of justice and individual liberty and has not fobbed it off as a mere question of administration. In Laughlin v. United States, 67 App. D.C.

355 92 F.2d 506 (1937) reversing a conviction for forgery in view of the prosecution's introduction of rebuttal evidence of another act of forgery, Chief Justice Martin's opinion stated (p. 509):

> "It is a well-established principle of law that upon the trial of an indictment charging a specific crime against the accused it is not competent for the prosecution to put in evidence proof tending solely to show that the defendant had been guilty of other similar offenses."

This Court quoted with approval the following excerpt from the famous Molineux case (see 92 F.2d at p. 509):

> "...In People v. Molineux [168 N.Y. 264, 61 N.E. 286, 62 L.R.A. 193], the court said: 'This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta.'"

See also Lovely v. United States, 169 F.2d 386 (4th Cir. 1948).

There are fundamental considerations of justice, — over and apart from mere administration or management of judicial enterprises -- underlying this Court's rigorous enforcement of the exclusionary rule of evidence. Originally it was considered that such evidence is "wholly irrelevant, but well calculated to prejudice and mislead a jury." Billings v. United States, 42 App. D.C. 413, 416 (1914). Recent opinions recognize the relevance but insist that the benefit of relevance is outweighed by the disadvan-

tage of the unfair prejudice from the creation of hostility to the defendant -- as well as from the problem of confusion of issues which was stressed in Lotsch.

In Boyer v. United States, 76 U.S. App. D.C. 397, 132 F.2d 12 (1942), this Court reversed a conviction for false pretenses for sale of warehouse receipts through fraudulent representations because of the admission of testimony that defendant had two years before sold another person similar warehouse receipts with the same false representations. The Court said (p. 13):

> "No doubt the alleged fact that a man committed a crime on another occasion tends to show a disposition to commit similar crimes. But when the prior crime has no other relevance than that, it is inadmissible. Its tendency to create hostility, surprise, and confusion of issues is thought to outweigh its probative value. The law seeks 'a convenient balance between the necessity of obtaining proof and the danger of unfair prejudice.' The alleged fact that a man committed one forgery clearly increases the likelihood that he committed another forgery, but testimony to the earlier crime is not, for that reason alone, admissible. We think the Littlepage testimony is within that principle." (Emphasis supplied)

As to the joinder of the trial of false pretenses on the sales to complaining witnesses with the trial for embezzlement of the proceeds, the Court said (p. 14):

> "...we think the facts charged in the one were sufficiently independent of the facts charged in the others so that it would have been better practice to hold two trials."

In Fairbanks v. United States, 96 U.S. App. D.C. 345, 226 F.2d 251, 254-5 (1955), reversing a rape conviction because of the prejudicial impact of testimony that six days previous defendant rapped on the door of a woman early in the morning, asking for matches, clad only in shorts with his private parts exposed, Judge Bastian quoted, as "particularly appropriate" the following excerpt from Michelson v. United States, 335 U.S. 469, 475 (1948):

> "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. (Emphasis supplied.)

The general rule of exclusion is admittedly subject to a number of exceptions. These basic exceptions are well stated in Bracey v. United States, 79 U.S. App. D.C. 23, 142 F.2d 85, 88 (1944):

> "Thus, evidence of other criminal acts has been held admissible by this court when they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged. Such evidence is admissible if it is so related to or connected with the crime charged as to establish a common scheme or purpose so associated that proof of one tends to prove the other, or if both are connected with a single purpose and in pursuance of a single object; as well as to establish identity, guilty knowledge, intent and motive."

These exceptions are provided where materiality of the evidence in proving an element of the offense outweighs

possible prejudice. Harper v. United States, 99 U.S. App. D.C. 324, 239 F.2d 945 (1956). The court there pointed out the problem of prejudice remains --

> "Evidence of other offenses always carries with it the danger of undue prejudice. Instead of giving the evidence its properly limited probative value, the jury may leap from the fact of commission of one crime to the conclusion of commission of the other." (Emphasis added.) (p. 946)

The possibility of prejudice was considered outweighed by materiality so that the evidence of other abortions was admissible to prove the intent of the defendant, who concededly administered the drug. The court added the caution:

> "Had the performance of the treatment been in issue, the evidence of the other abortions might have been more prejudicial than probative. (p. 947)

e. In Dunaway v. United States, 92 App. D.C. 299, 205 F.2d 23, 26-7 (1953), the court held that Kidwell does not require reversal if the likelihood of the jury having considered evidence of one offense as corroborative of the other is insubstantial.

In that case it was noted that the evidence in support of each of the offenses on which defendant was convicted was simple, not lengthy, and unlikely to cause confusion, since it was readily referable to the crime with respect to which it was introduced.

The court expressly said it was not ready to subscribe to the views expressed in Lotsch as contrasted with those in Kidwell. But it considered that the joinder was consistent with the rule that proof of other

offenses is inadmissible in a criminal case "on the theory that the evidence will be considered only with respect to the offense as to which it is admitted as relevant."

The Dunaway opinion emphasized that defendant had been acquitted on one of the counts -- a factor which minimizes, if it does not entirely eliminate, a claim of prejudice through cumulative effect on the jury. United States v. Perlstein, supra; Culjak v. United States, 53 F.2d 554, 556 (9th Cir. 1931).

In the absence of an acquittal and the nonprejudice it may imply, it is submitted that prejudice can not fairly be avoided by a presumption that the jury will consider each offense charged solely in relation to the testimony offered on that offense, disregarding, temporarily, the evidence introduced as to the other offense.

Even where the jury is deliberating on a single offense there is prejudice when it has been permitted to hear any significant evidence of an unrelated offense that is more than a casual reference. That prejudice is not obviated by an instruction to disregard the evidence in question. See Boyer v. United States, supra.

The dubious assumption that a jury will in fact disregard evidence which it is told to disregard completely in the jury room has been called a "naive assumption" tantamount to an "unmitigated fiction," cf. Jackson, J., concurring, Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 723 (1949). But the

fiction is carried to the point of fantasy when, by hypothesis, the evidence must be retained in the jury room, must be carefully studied and weighed in all its elements in one phase of the discussion, and then must be temporarily but completely covered over with a mental drop cloth in another phase of the discussion. This off-again, on-again approach is difficult enough when applied to the reflections of a judge. It cannot reasonably be carried into the jury room. Fictions may have a place in the law, but not to imperil the liberties of men on trial.

A related problem sometimes arises when different defendants are tried together, for certain evidence may be admissible against some and not others. But at least Rule 8(a) prohibits charging two defendants in the same indictment unless "they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." There is an imperative need to avoid endless delays in administration of justice by having a single trial rather than multiple trials on the same series of acts or transactions. No such need or benefit to society exists as to joinder of trial of unrelated offenses. Where multiple defendants are charged with offenses that are not connected, they are automatically prejudiced by that very joinder for trial, and the trial court has no discretion to deny relief even though convinced that

there was no prejudice in fact. See Ward v. United States, 110 U.S. App. D.C. 136, 289 F.2d 877 (1961). It is submitted that in principle it is a basis for motion under Rule 14 before trial, or for appropriate motion during and after trial, that joinder of unrelated offenses embarrasses and prejudices a fair defense by holding the defendant out to be a habitual criminal.[7/] It is submitted that at least this raises a presumption of prejudice which prevails unless rebutted by the Government.

2. Prejudice In This Case

The possibility of prejudice is not fairly rebuttable under the facts of the present case. Indeed, to use the words of Kidwell, the offenses here are plainly such as to indicate "that the jury might regard one as corroborative of the other when, in fact, no corroboration exists." The particular fillip to improper cumulative use lies in the fact that both offenses involved daylight robbery or attempted robbery of a High's ice cream store.

Even with the joinder of offenses, the jury could not agree on a verdict between 3:15 and 4:30 p.m., returned the next morning at 10 and gave its verdict at 11:15 a.m. (Tr. 260, 262-3).

7/There is a statement to the contrary in Pummil v. United States, 297 F.2d 34 (8th Cir. 1961) where a charge of robbery on November 19, 1954 was joined with a charge of robbery on September 26, 1955. However, the opinion on this point states a bare conclusion and does not probe or consider the underlying problem. Moreover, as the court pointed out, if there had been any sound basis for such a motion it should have been filed under Rule 14, and no such motion was filed in that case.

If the cases had been tried separately, the prosecution would have had significant difficulties in each case in attempting to convince a jury of guilt beyond reasonable doubt. When the cases were tried together, the difficulties in one offense were able to be overcome in the jury's mind through its awareness of the evidence involved as to the other offense. The prejudice essentially lies in reinforcing a weak identification through testimony as to another identification.

Take the first offense, the robbery of the Capitol Street store on July 27, 1962 at 4 p.m. Theresa Powell accounted for defendant's presence elsewhere at that time. (See Statement, item 6.) There were problems as to the identification of defendant made by complaining witness Mary Waley. She was frightened at the time of the offense yet three weeks later she picked defendant out of a lineup. She could identify him in the lineup although he there wore a long coat, and she said she could identify him without sunglasses although she didn't know what his eyes looked like. What is significant is that she recalled that the men in the lineup -- there were five, including defendant -- were of different heights (although there was one of the same height as defendant). (Tr. 42-5.)

That doubt was not removed by her direct testimony that she had had opportunity to observe the robber for five or six minutes while he was left waiting alone in the store, -- she didn't say she had actually observed

him during all this time. That curious testimony was hardly satisfactory, since it involved the assumption that for 6 minutes she stacked six bottles of milk, a task to be measured in seconds. Her disjointed explanation about its being her lunch time (at 4 p.m.!) and she wasn't in a hurry to go out but was stretching around in the box -- all left an abiding doubt. (Tr. 37-41.)

The prosecution was able in effect to finesse any difficulties in the jury's mind with identification of the Capitol Street robber by the testimony of the dramatically quick identification of defendant within 25 minutes after the second offense at the Grant Street store.

There were difficulties with this second identification, too, separately considered. It was not until 20 minutes after Mrs. Hughes phoned the police station that defendant was picked up. He was then only 25 man's size steps from the store, without a gun, walking at a normal pace. Officer Williams testified that he picked up defendant because he matched the radio description of the clothing (Tr. 150). Notwithstanding the recency of the offense, Mrs. Hughes was uncertain at first, and did not identify defendant until he put on sunglasses (see Olds. Tr. 167). By the time she came to court, Mrs. Hughes' identification was so strong that she believed she had identified defendant even without the sunglasses (Tr. 67), but this is contrary to the testimony of Officer Olds.

The summation of the prosecuting attorney heightened the prejudice. He said (Tr. 211) that Detective Rogers noted the similarity in the events of July 27 and August 13 and then telephoned Miss Waley, the first complainant, to view the lineup. Detective Rogers had given no such testimony to the jury. But in any event the fact that reference to similar offenses by a detective is justifiable as a matter of investigative technique, certainly does not justify such linkage together in the course of a combined trial of unrelated offenses.

On the cardinal issue of identification, the prosecuting attorney skillfully blended the two lines of evidence, by describing this as "a case where there are two crimes, where there are several witnesses who identify defendant clearly" (Tr. 213). The mistrial promptly requested by defense counsel should have been granted.

The Court considered that he could cure any such prosecution blending, stating in effect (Tr. 239): I don't care what Government counsel says. I'll tell the jury that these are two separate crimes.

The prejudicial impact on a jury of improper prosecution summation cannot be washed away by even the most meticulous instruction after the fact. If prosecuting attorneys insist for tactical reasons on trying unrelated offenses together they have a duty at a minimum to be scrupulous in the course of summation to separate out the testimony as to each offense, so as to

avoid enhancing the temptation and prejudice of improper cumulative use of testimony. Failure to maintain this separation was prejudicial conduct calling for a mistrial.

There is no substance to any contention that defendant was not subject to prejudice because the jury was not supposed to consider the evidence of the second identification in appraising the first identification. The judge did instruct the jury that the Government must prove beyond a reasonable doubt as to each of the two separate charges, -although the judge put it somewhat peculiarly that "he has a right to be charged that way" (Tr. 244). The judge also gave the standard instruction that in considering whether the Government had established the charges beyond a reasonable doubt, the jury must consider and weigh the testimony of all the witnesses who appeared (Tr. 248). It is not consistent with a due regard for liberties on trial to conclude that prejudice has been avoided by indulging a premise of mental legerdemain in the jury room, -- that while considering the charges as to one offense the jury would disregard completely, but temporarily, testimony as to the other incident which they studied and weighed carefully and completely at the same session. This is to carry Justice Jackson's "unmitigated fiction' to the point of unbridled fantasy.

B. Further Sources of Prejudice: Confusion of Offenses of Robbery and Attempted Robbery at the Trial; Defendant Was Required to Forego Taking the Stand to Reinforce Testimony of His Presence Elsewhere at the Time of the Robbery in Order to Avoid Forfeiting His Right to Rest on the Prosecution's Proof as to the Attempted Robbery Without Taking the Stand

1. The two offenses were confused with each other at the trial. Thus, Officer Olds when asked whether there was anyone else in the Grant St. store at the time of the attempted robbery said he believed there was but he was not sure, he might be mixed up with the occurrence at the other High store (Tr. 172).

Also, there was a recurring disposition by police witnesses, prosecuting attorney, and the Court, to refer to the second offense as a "robbery" or another "robbery" instead of "attempted robbery." 8/

2. Defendant was particularly subjected to prejudice in that he had to forego a fundamental right as to one offense, the right to take the stand, because its exercise would have required him to forfeit a fundamental right as to the other offense, the right to decline to take the stand without any adverse inference.

This was pointed out by defense counsel before the trial began as a reason for the severance (Tr. 16). When

8/ See e.g., Tr. 70-72, where the prosecuting attorney asked and Detective Rogers answered questions about the investigation of the "robbery" at the Grant St. store on August 13, 1962; Tr. 142, where the Court said: "Don't let's talk about any robbery other than the two involved in this case." Tr. 150 and 152, where Private Williams referred to a robbery at the Grant St. Store. Tr. 212, where the prosecuting attorney argued that defendant was identified some 15 minutes after the robbery.

he sought a ruling that defendant's taking the stand for one purpose would not open him up to examination for all purposes, the Court declined to give an advance ruling unless and until defendant took the stand (Tr. 136). The prosecution would not agree to any stipulation on the point (Tr. 136-7).

Unlike Dunaway, the defendant in this case did not take the stand. If the robbery offense had been tried alone, defendant could have taken the stand to reinforce the testimony of the sole defense witness, Mrs. Powell, setting forth his presence elsewhere on July 27. But defendant was prejudiced in this robbery defense by his inability to take the stand for this purpose without forfeiting his right, as to the charge of attempted robbery on August 13, to rest on the weakness of the prosecution's proof without taking the stand and without any adverse inference from his failure to take the stand. He was thus "confounded" and "embarrassed" in his defense.

II. THE COURT ERRED IN DENYING A MISTRIAL AFTER THE PROSECUTION IN SUBSTANCE CALLED THE JURY'S ATTENTION TO DEFENDANT'S FAILURE TO TAKE THE STAND, PARTICULARLY IN VIEW OF THE PRIOR DEFENSE MOTION STRESSING THE IMPORTANCE OF THAT RIGHT IN THIS CASE

In White v. United States, 314 F.2d 243, No. 17183, November 21, 1962, this Court held that it was error for the prosecution to set forth in argument that defendant failed to take the stand, and that the possibility of prejudicial error was not cured by an instruction that no inference arises because of the failure of defendant to take the stand. In the White case, as in this the Court, over defense objection, made a ruling that

permitted police officers to testify as to oral admissions by defendant.

Appellant's counsel brought out on cross-examination that a written report made by the police officer involved shortly after allegedly hearing the oral admission made no reference to the alleged confession but stated only: Defendant denies the charge (Tr. 196-7). The police officer's explanation was: "It was an oral statement and need not be put in this statement of facts." (Tr. 201.)

In this posture of the case, although defendant had not taken the stand, the nature of the contemporaneous report of the police officer was itself an impeachment of his testimony that an oral admission had been made -- an impeachment clearly indicated by defense questioning, and later set forth in the argument to the jury (Tr. 227).

The prosecuting attorney, perhaps in anticipation of this defense presentation, argued to the jury (Tr. 213):

> There was nothing that was produced to you, testimony before you, to the effect that the statement was not voluntarily made." (Emphasis supplied.)

This was improper under White. In context it was plainly a comment that defendant had not himself taken the stand.

The prosecuting attorney was under clear notice that the defendant regarded taking the stand as a critical matter. The motion for severance asserted prejudice in the inability to take the stand in one case without taking it in the other. Defense counsel sought in vain

to obtain a ruling from the Court or a stipulation by the prosecution that defendant could take the stand for one purpose and not another (Tr. 136-7).

Under these circumstances, the prosecutor had a particular duty to avoid any argument or summation which would expressly or by implication comment on the defendant's failure to take the stand.

The comment of the prosecuting attorney was no less pointed because it was softly stated. The summation clearly reveals the skill of this prosecuting attorney in innuendo and emphasis through understatements.[9/]

The Court was sensitive to the problem that the prosecuting attorney had in substance commented on defendant's failure to take the stand. The Court

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9/ This comment was of a piece with his innuendo in closing argument, casting doubt on Mrs. Powell's account of Drew's whereabouts on July 27 on the ground that there had been a delay after August 13 before she was interviewed by defense counsel.

This point could easily have been dispelled if defense counsel had had opportunity to explain the rudiments of criminal procedure.

It should be noted that Mrs. Powell testified that Drew had roomed at her house about three weeks after July 27, 1962; that she had not even learned of his arrest until September 18 when his brother came to pick up his clothing but said nothing about the case (Tr. 192). The indictment had been filed only the day before.

In due course, after denial of certain pre-trial motions, defense counsel -- actually the associate of the counsel originally appointed by the Court -- visited Mrs. Powell in the course of his preparation for trial, and obtained her account of Drew's whereabouts at the time of his alleged robbery.

specifically cautioned prosecution attorney to avoid arguing that there is no denial or evidence to refute this. He denied mistrial with the statement that the jury will disregard what the prosecutor said, and that he would instruct them that the defendant is under no duty to take the stand. (Tr. 213-4.)

The White case establishes that the prejudice to defendant from the prosecution's improper summation is not cured by the fact that the Court gives a proper instruction that no inference arises from the defendant's failure to take the stand.

III. THE COURT ERRED IN NOT REQUIRING A PRE-SENTENCE PSYCHIATRIC EXAMINATION AND EVALUATION

In imposing sentence upon Drew, the trial judge recommended that the defendant be given benefit of a full psychiatric examination and evaluation in view of his bizarre behavior and history of crime dating back to 1950. In pointing out that he has sixty (60) days within which time to reduce the sentence, the judge requested that he be furnished with the psychiatric evaluation report within 60 days, the time available to him to reduce the sentence under Rule 35 of the Federal Rules of Criminal Procedure. (Letter of Probation Officer to Director, Bureau of Prisons, January 28, 1963.)

On January 30, 1963, the Probation Officer advised the trial judge that he had made arrangements with the

Bureau of Prisons to conduct a psychiatric evaluation, but that the Bureau of Prisons could not take custody of defendant and, therefore, was unable to conduct the psychiatric evaluation, in view of the fact that he had noted an appeal and made the election not to begin the service of sentence pending the appeal. (Memorandum of Probation Officer, dated January 30, 1963.)

In view of the judge's own determination that he wished to be provided with a psychiatric evaluation for purposes of exercising his complete sentencing authority, it was error for him to have failed to avail himself of the arrangements available in the District of Columbia for providing such evaluation prior to imposing sentence. In Leach v. United States, U.S. App. D.C. , No. 17,459, decided April 25, 1963, the Court reversed a sentence because the sentencing judge had failed to utilize the pre-sentence psychiatric assistance available as to offenses against the District of Columbia Code from Legal Psychiatris Services, a branch of the District of Columbia Department of Public Health (see 24 D.C. Code §106). As this Court there noted, commitment may be made prior to sentence to a hospital for examination to determine the mental competence of the offender.

In effect, the trial judge was ruling that although he considered the case an appropriate one to request the benefit of a psychiatric evaluation, this would be provided only if the defendant would agree to serve his

sentence pending appeal and to forego an election not to begin the service of sentence. This was prejudicial error.

CONCLUSION

The judgment should be reversed and the case remanded for separate trials.

Respectfully submitted,

Harold Leventhal
Attorney for Appellant
Appointed by the Court

May , 1963

CHAMBERS OF JUDGE BASTIAN

DLB-GW-MCG
6-18-63

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,611

NATHAN L. DREW,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL MEMORANDUM OF APPELLANT

Pursuant to leave of Court at the oral argument appellant files this memorandum in rebuttal of the Government's contention (Br. p. 7) that the evidence of earlier crime would have been admissible in a separate trial of the other, -- on the issue of "identity".

As Judge Stephens noted in Martin v. United States, 75 U.S. App. D.C. 399, 127 F.2d 865, 871 (1942), -- "The proper admission of evidence within the identity exception to the general rule excluding evidence of crimes other than the one charged is illustrated in Eagles v. United States, 1928, 58 App. D.C. 122, 25 F.2d 546." Eagles permitted introduction at a murder trial of evidence that the pistols found near the place where the deceased policeman was shot had been obtained by defendants in robberies perpetrated several weeks prior to the homicide.

Plainly there is at best only a narrow group of cases where evidence of another crime is admissible to establish identity on the ground that the crimes were so alike in distinctive detail that the same person must have committed both crimes.

In the celebrated case of People v. Molineaux, 168 N.Y. 264, 313, 61 N.E. 286, 302, it was held that at a trial for murder by sending cyanide through the mails to a member of the Knickerbocker Athletic Club, the cyanide having been labeled as Bromo Seltzer and part of a silver container gift package, it was prejudicial error to admit proof linking defendant to a murder of another member of the club by sending him cyanide mixed in "Kutnow" powder. The evidence was inadmissible even though "the two crimes are parallel as to the methods and means employed in their execution". The Court considered the "identity" exception, distinguished the cases where the other crime supplied the means to carry out the crime at law, and added:

> "In the nature of things, there cannot be many cases where evidence of separate and distinct crimes, with no unity or connection of motive, interest, or plan, will serve to legally identify the person who committed one as the same person who is guilty of another. The very fact that it is much easier to believe in the guilt of an accused person when it is proven or suspected that he has previously committed a similar crime proves the dangerous tendency of such evidence to convict, not upon the evidence of the crime charged, but upon the superadded evidence of the previous crime. Hence our courts have been proverbially careful to subject such evidence to the most rigid scrutiny, and have invariably excluded it in cases where its relevancy and competency was not clearly shown."

The identity exception invoked by the Government imposes a very strict standard. See McCormick, Evidence, p. 328: "The device used must be so unusual and distinctive as to be like a signature."

The fact that both offenses here involved daylight robberies of High stores would likely seem corroborative to a jury, yet would not serve to satisfy the strict requirement of the identity exception. Compare United States v. Magee, 261 F.2d 609, 611 (7th Cir. 1958) where the Government argued in vain that at a trial for robbery of a bank it could introduce evidence of two instances where defendant had been identified as the person who robbed other financial institutions.

Certainly the identity exception is inapplicable where there is a difference as great as here in the means of execution of the offenses. Not only did the person who committed the July robbery begin by saying, "This is a holdup," he also kept his hand in his pocket and overcame the initial hesitation of complaining witness by pulling out his hand far enough to show a gun. The person who committed the August attempt, on the other hand, did not say this is a holdup, did not start out with his hand in his pocket, and notwithstanding verbal resistance by complaining witness did nothing more than reiterate, give me the money.

In Mason v. State, 259 Ala, 438, 66 F.2d 557 (1953), a trial for robbery with a pistol, the Court held inadmissible evidence showing that defendant had committed another

robbery with a knife. Such evidence did not come within the limited "identity" exception rule, which the Court set forth as follows:

> "All evidence tending to prove a person's guilt of the offense charge may loosely be said to identify him as the guilty person. But identity, as here considered, assumes what may be called a 'mark' upon the guilty person; and proposes to show that defendant is the person having that mark, as evidenced by its being there in his commission of another similar offense. Wigmore, sec. 410-412. Thus, when it is shown that the person who committed the offense committed it in a novel and peculiar manner, it may be shown that the defendant ccommitted other offense in the same novel and peculiar manner."

The admissibility of other offenses as evidence is more rigidly confined where defendant's commission of the act is in issue than where the act is conceded and the only issue is intention. Harper v. United States, 99 U.S. App. D.C. 324, 239 F.2d 945, 946 (1956).

The limited "identity" exception would not have permitted receipt of evidence of the other crime if there had been separate trials in the case at bar.

Respectfully submitted,

/s/ Harold Leventhal

Harold Leventhal

Attorney appointed by the Court

June 19, 1963

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,611

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v.

UNITED STATES OF AMERICA,

Appellee.

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The limited "identity" exception would not have permitted receipt of evidence of the other crime if there had been separate trials in the case at bar.

Respectfully submitted,

/s/ Harold Leventhal

Harold Leventhal

Attorney appointed by the Court

June 19, 1963

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17611

NATHAN L. DREW, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
BARRY SIDMAN,
ROBERT A. LEVETOWN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. Did the trial court abuse its discretion in denying appellant's motion for a severance of the two charges against him, where the evidence to support each count was simple and distinct, where the crimes charged were closely connected in time, place and circumstance, and where appellant failed to demonstrate that he was prejudiced by joinder?

2. In the circumstances of this case, did the prosecutor necessarily comment on the appellant's failure to testify when he observed it was "uncontradicted" that appellant's confession was voluntary?

3. Could the District Court, incident to sentencing, choose, at its discretion, any suitable psychiatric service from among the available public facilities to examine appellant and report back to the court?

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INDEX

TABLE OF CASES

OTHER REFERENCES

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No. 17611

NATHAN L. DREW, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In an indictment filed in the District Court on September 17, 1962, appellant was charged with a violation of 22 D.C. Code § 2901 (robbery) and a violation of 22 D.C. § 2902 (attempted robbery) (J.A. 1). A motion to compel severance of charges was heard and denied on October 26, 1962. A jury trial resulted in verdicts of guilty on both counts (J.A. 111). By judgment entered January 25, 1963, appellant was sentenced to five to fifteen years imprisonment on count one (robbery) and to one to three years imprisonment on count two (attempted robbery), the sentences to run concurrently (J.A. 113). An appeal at public expense was granted by the District Court.

The evidence relating to count one showed that on July 27, 1962, late in the afternoon, appellant entered a High's Dairy store located in the Northeast section of Washington (J.A. 6–7). Appellant wore a coat, a hat, and sunglasses (J.A. 15). The sales clerk, Miss Mary M. Waley, observed appellant from the rear of the store where she was putting milk bottles on the shelves (J.A. 6–7). When she came forward to serve appellant

he announced, "I want your money, all of it" (J.A. 7). As appellant was collecting the money, about fifty dollars, a customer entered the store (J.A. 8, 13). Appellant then left with the cash (J.A. 8). Miss Waley subsequently picked appellant out of a line-up of approximately six men; she also positively identified him at trial (J.A. 7, 9, 14–16).

The evidence relating to count two showed that on August 13, 1962, late in the afternoon, appellant entered a High's Dairy store in the Northeast section of Washington (J.A. 22–24). Appellant wore a coat, a hat, and sunglasses (J.A. 26–27). The sales clerk, Mrs. Mary C. Hughes, offered to serve him (J.A. 23). Appellant said, "Give me all the money" (J.A. 23). Mrs. Hughes challenged him to "come and get it" (J.A. 23, 28). As appellant hesitated, a customer entered (J.A. 23). Appellant walked out of the store without the money (J.A. 23, 28). Mrs. Hughes immediately telephoned a report of the incident to the 14th police precinct (J.A. 25). The report was relayed to two officers in a police cruiser who were in the vicinity investigating an accident (J.A. 42, 44). The officers responded to the scene and apprehended appellant who was approximately twenty-five yards from the store (J.A. 42). He was brought back to the store where Mrs. Hughes identified him (J.A. 27, 51). She also identified him at trial (J.A. 24).

Appellant confessed to both crimes at the police precinct in the presence of Detectives Rogers and Chaplin (J.A. 35). At trial, Rogers was called as a witness for the Government. He testified that appellant was offered no inducements and his confession was completely voluntary (J.A. 35). In the course of his summation, the prosecutor pointed out that this testimony, which established appellant's confession to be voluntary, was uncontradicted (J.A. 79).

In imposing sentence, the trial court requested that the Bureau of Prisons evaluate appellant psychiatrically and report back to the court (J.A. 116). As yet, the Bureau of Prisons has not been able to comply with this request since appellant elected not to serve his sentence pending appeal; his election prevented the Bureau of Prisons from taking custody of him (J.A. 117–118).

STATUTES AND RULES INVOLVED

Title 22, District of Columbia Code, Section 2901 provides:

> *Robbery.* Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Title 22, District of Columbia Code, Section 2902 provides:

> *Attempt to commit robbery.* Whoever attempts to commit robbery, as defined in section 22–2901, by an overt act, shall be imprisoned for not more than three years or be fined not more than five hundred dollars, or both.

Rule 8(a), Federal Rules of Criminal Procedure, provides:

> *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 14, Federal Rules of Criminal Procedure, provides:

> *Relief From Prejudicial Joinder.* If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Rule 35, Federal Rules of Criminal Procedure, provides:

> *Correction Or Reduction Of Sentence.* The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is

imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

SUMMARY OF ARGUMENT

I

Appellant has failed to sustain his burden of demonstrating that the trial court abused its discretion in denying the motion for severance of charges. The two counts, robbery and attempted robbery, were properly joined as "similar crimes." The evidence as to each count was severable and distinct. Each of the crimes charged was closely connected to the other by time, place and circumstance. The *modus operandi* was, in fact, so similar that evidence of each crime would have been admissible in a separate trial of the other to establish appellant's identity. Accordingly, since the evidence was independently admissible, no prejudice could proceed from joinder.

In any event, the jury was carefully instructed that each count had to be separately proved by the Government. Appellant's theory that the jury was incapable of heeding the court's instructions does not constitute a showing of prejudice. There is no other indication that joinder caused appellant to be embarassed or confused in his defense.

II

In the course of his summation, the prosecutor observed that testimony that appellant's confession had been voluntary was uncontradicted. This was a permissible comment on the posture of the evidence. It was not a comment on the failure of appellant to take the stand, especially in the context of this case where another witness was present when the confession had been made and could have testified to the surrounding circumstances. In any event, the prosecutor's remark was not objected to at trial and the trial judge *sua sponte* cured any error inherent in the remark by appropriate admonishments and instructions.

III

Incident to sentencing, the District Court could properly ask for a psychiatric evaluation of appellant from the Bureau of Prisons. Appellant has no right to be examined by one public psychiatric service in preference to any other.

ARGUMENT

I. The trial court did not abuse its discretion in denying the motion for severance

Appellant concedes that "* * * Rule 8(a) of the Federal Rules of Criminal Procedure clearly permitted the two offenses [robbery and attempted robbery] to be joined together since they 'are of the same or similar character * * *.'" Appellant's Brief, p. 23. See also *Posey* v. *United States*, 26 App. D.C. 302, 304 (1905) [counts of arson and attempted arson joined]. Appellant claims, however, that applicable statutory history, as well as the judicial gloss on the rules, indicates that even similar crimes can remain consolidated for a joint trial only when "properly joined." He argues that as disclosed by the facts of this case, the charges were not properly joined.

Joinder was proper, however, under the criteria established by this Circuit. Moreover, appellant was not prejudiced by joinder; and in any event, the entire matter of severance of charges or other relief from joinder rests in the discretion of the trial court and that the discretion was appropriately exercised in this case.

The fundamental objection to joinder is that a jury may use evidence adduced in support of one charge to convict of another charge not adequately proved. However, the possibility that the jury may confuse the evidence does not exist where the evidence to support each count is "short, simple, separable and distinct." *Maurer* v. *United States*, 95 U.S. App. D.C. 389, 222 F. 2d 414 (1955). The evidence in this case meets the criterion of simplicity and severability.

In support of count one, Miss Waley, the sales clerk, testified to all the elements of the robbery. In support of count two, Mrs. Hughes, the sales clerk, testified to all the elements of the attempted robbery. With reference to both counts,

Detective Rogers described appellant's confession to each of the crimes. Other witnesses testified briefly for the Government, but their testimony was of limited significance in the case and in some instances they were not even cross-examined.[1]

This Court held that evidence met the test of simplicity and severability in *Maurer* v. *United States, supra,* [five counts charging a policeman with accepting bribes from five different persons to whom he had given traffic tickets]; in *Dunaway* v. *United States,* 92 U.S. App. D.C. 299, 205 F. 2d 23 (1953) [five counts of housebreaking and larceny arising out of three break-ins]; in *Smith* v. *United States,* 86 U.S. App. D.C. 195, 180 F. 2d 775 (1950) [multiple count charging receipt of money for two different females to engage in prostitution]; in *Robinson* v. *United States,* 53 App. D.C. 96, 288 Fed. 450 (1923) [multiple counts based on sales of narcotics on three different dates].

Another test to determine the propriety of joinder of offenses is whether the accused was "embarrassed or confounded" in the presentation of his defense. *Maurer* v. *United States, supra.* The appellant claims that he was so "confounded" but the record does not bear him out. A friend of his, Theresa Powell, took the stand and alibied that appellant had been at her home during the afternoon of July 27, 1962, the date of the robbery alleged in count one. No alibi was possible with reference to the attempted robbery which took place on August 13th since appellant was apprehended twenty-five yards from the store just minutes after the crime had occurred.

Appellant argues that he was "embarrassed" in his defense because he desired to testify with respect to one charge but not with respect to the other. Appellant's Brief, p. 20. It is difficult to fathom the source of his embarrassment since

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[1] For instance, Roland Twombly, a store supervisor for High's Dairy Products, was called to testify that High's operated the two stores referred to in the indictment and also that High's was a corporation (J.A. 19–20). Paul Smallwood and Vernice Ross, the customers who entered the respective stores just after the crimes were committed were also called as witnesses, but neither could identify the appellant (J.A. 20–22, 49–50). They were not cross-examined. The police officers who responded to the scene of the attempted robbery, Officers Williams and Olds, briefly described how the appellant was apprehended in the immediate vicinity of the store shortly after the attempted robbery took place on August 13th.

cross-examination would necessarily have been confined to the occurrences that appellant would have described during his own testimony. "* * * [I]n the federal courts for over a hundred years the rule has been that the scope of cross-examination is limited to the subject matter referred to during the examination in chief * * *." *Bell* v. *United States*, 185 F. 2d 302, 310 (4th Cir., 1951); *Dixon* v. *United States*, 112 U.S. App. D.C. 366, 303 F. 2d 226 (1962). If appellant wished to testify concerning one charge only, he would have been cross-examined concerning one charge only.[1a]

A third test for gauging the permissibility of joinder is whether the offenses were closely connected in time, place and circumstance. *Williams* v. *United States*, No. 17349, D.C. Cir., decided March 28, 1963. In the present case, the offenses occurred only 17 days apart; both crimes took place in the late afternoon in the Northeast section of Washington. In each case, appellant chose a High's Dairy store manned, apparently, by a lone, female clerk. Each time the appellant wore a hat, coat and sunglasses; each time he demanded "all" the money; and each time he immediately left the premises when a customer entered.

The foregoing facts illustrate that not only were the criteria for joinder as set forth in *Williams* v. *United States, supra*, satisfied in this case, but also, that evidence of each crime would have been admissible in a trial of the other, had they not been joined. The evidence of the other crime would have been admissible on the issue of identity: the jury would have been permitted to infer from the similarity of method and circumstance, *i.e.*, the similarity of the *modus operandi*, that both offenses were committed by the same person. *Martin* v. *United States*, 75 U.S. App. D.C. 399, 403–404, 127 F. 2d 865 (1942), concurring opinion of Stephens, J. cited with approval in *Payne* v. *United States*, 111 U.S. App. D.C. 94, 294 F. 2d 723; *Bracey*

[1a] But according to appellant's counsel at trial, that was not appellants' wish. He indicated that appellant contemplated taking the stand to contest the voluntariness of his confession (J.A. 32–33). Since appellant confessed to both counts and since both confessions came at the same time, joinder could not have affected his decision not to testify. If appellant was serious about raising the issue of voluntariness through his own testimony, he would have taken the stand with respect to both counts regardless of whether the crimes were tried jointly or separately.

v. *United States*, 79 U.S. App. D.C. 23, 26, 142 F. 2d 85, 88 (1944); 1 Underhill, Criminal Evidence § 205 (5th Ed. 1956). Since the evidence of each offense would be admissible in a separate trial of the other, appellant would have gained nothing by separate trials and he was not prejudiced by joinder.[1b]

Rule 14, upon which appellant's claim for severance rests, "restates the common law rule, that a motion for severance was addressed to the trial court's discretion, subject to review only for clear abuse." *Robinson* v. *United States*, 93 U.S. App. D.C. 347, 349, 210 F. 2d 29, 32 (1954). Rule 14 is entitled "Relief From Prejudicial Joinder" and requires an affirmative showing of actual prejudice to the defendant from joinder. *Schaffer* v. *United States*, 362 U.S. 511, 515–516 (1960). Here the appellant has made no such showing. Moreover, his claim that prejudice inheres in the trial together of similar crimes (since "the jury might regard one as corroborative of the other"), goes too far. If prejudice exists merely because crimes tried together are similar, then joinder would never be proper under the "same or similar crime" phraseology of Rule 8(a). In fact, in view of the Rule 8(a) standards for joinder, any "corroboration" solely through similarity of offense may be precisely the type of prejudice which cannot be complained of under Rule 14.

In this case, moreover, the jury was repeatedly admonished by the defense attorney, the prosecutor and the trial judge that one crime was not to be considered corroborative of the other. (Tr. 7–8, 24; J.A. 82–83, 96, 100–101). The complete and accurate instructions of the trial court take on added significance in this situation since Rule 14 commits to the trial

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[1b] It should be noted, however, that while the circumstance of independent admissibility completely bars any possibility of prejudice, the converse is not true: thus even if each crime would not have been admissible in a trial of the other, that alone does not demonstrate prejudice. In *Langford* v. *United States*, 106 U.S. App. D.C. 21, 268 F. 2d 896 (1959) joinder of two counts of robbery of different victims a week apart was held proper despite the fact that the similarity between the two crimes derived solely from their statutory designation as robberies. The first offense was a hold-up of a store; the second was a street yoke robbery. Each crime was so factually dissimilar from the other that, obviously, proof of one would not have been admissible in a trial solely of the other. However, this Court held that joinder was proper since the evidence as to each crime was severable and distinct. 106 U.S. App. D.C. at 22, 268 F. 2d at 897.

court's discretion the power to provide "separate trials * * * or * * * *whatever other relief justice requires.*" The requirements of justice were satisfied here by the various admonitions and instructions to the jury throughout the trial that each charge was to be separately considered.[2]

Appellant, however, finds the notion that a jury would be capable of heeding these admonitions to be an "unmitigated fiction," sheer "fantasy." Yet the "fantasy" is supported by fact. There are cases in this Circuit which document the ability of juries to consider separate counts separately. For instance, in *Dunaway* v. *United States, supra,* the jury considered the evidence on three housebreaking charges, acquitted the defendant on one charge and convicted him of the other two. In *Maurer* v. *United States, supra,* where multiple counts of bribery were alleged, the jury acquitted the defendant of the first count, convicted him of the second and third, and were unable to agree on a verdict for count four.[3] Also, in *Peckham* v. *United States,* 93 U.S. App. D.C. 136, 210 F. 2d 693 (1953), where two counts of abortion were alleged, the jury demonstrated its ability to evaluate the evidence separately since it convicted the defendant of the first abortion but acquitted him of the second. It has been observed that juries are presumed to follow the instructions given them by the trial court. *Delli Paoli* v. *United States,* 352 U.S. 232, 242 (1957). Concededly, this rule evolves from a robust sense of practicality; but the rule also has a basis in fact as applied to the present problem as the foregoing cases illustrate.

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[2] Appellant would have this Court find reversible error in a fragmentary comment of the prosecutor. During summation, he stated:

> "I don't want to be presumptuous because it is the Government's burden to prove a case beyond a reasonable doubt, but in a case where there are two crimes, where there are several witnesses who identify the defendant clearly——" (J.A. 79).

At this point, counsel for defense interrupted and the thought was never completed. If it can be said that this unfinished sentence was an attempt to make the evidence appear cumulative to the jury, it was an abortive attempt at best. Viewed against the background of the constant stream of admonitions, arguments and instructions in this case which cautioned the jury to evaluate the evidence separately as to each count, the comment could not possibly have deprived appellant of a fair trial.

[3] A directed verdict of acquittal was ordered by the trial court on a fifth bribery count.

II. The prosecutor did not comment on the Appellant's failure to testify

In the course of his summation, the prosecutor stated that no testimony had been produced to indicate that appellant's confession was involuntary. His exact words were as follows:

> Now, there is an issue in this case, as in most cases, as to whether any statement made by the defendant was voluntary. There is nothing that was produced to you, testimony before you, to the effect that the statement was not voluntarily made. It was brief, abbreviated, and you might even say it was short, but we have a confession (J.A. 79).

This statement is now condemned by appellant as a comment upon his failure to take the stand. His position rests upon a misconstruction of *White* v. *United States*, — U.S. App. D.C. —, 314 F. 2d 243 (1962).

In *White*, it was conceded that the prosecutor had commented on the accused's failure to testify. The issue there was whether the comment was prejudical. Here, on the other hand, the issue is whether the prosecutor's comment was, in fact, an allusion to appellant's election not to take the stand.

On its face, the comment was nothing more than a permissible observation concerning the uncontradicted posture of the testimony. Counsel for appellant at trial did not understand it to be otherwise for although he objected to the prosecutor's argument at the time the comment was made, he did not claim that the comment referred to appellant's failure to testify (J.A. 79–81). *Peden* v. *United States*, 96 U.S. App. D.C. 27, 223 F. 2d 319 (1955) illustrates that a comment describing the posture of the evidence is not to be transformed into an infringement of a constitutional right unless the factual context in which the comment is made necessarily requires that result. In *Peden*, the accused had first confessed, then denied his confession, in the presence of three police officers. One of these officers testified to these statements at trial. In summation, the prosecutor pointed out that testimony concerning the defendant's statements stood uncontradicted. This Court held that the prosecutor's comment was not necessarily a

reference to the defendant's failure to take the stand since the testimony concerning the confession could have been refuted by the other two policemen present.

In this case, appellant confessed in the presence of Detectives Rogers and Chaplin (J.A. 35–36). Rogers testified at trial that appellant's confession was voluntarily given. The prosecutor noted that this testimony stood uncontradicted. In view of the presence of Detective Chaplin during the confession, this statement was not necessarily a reference to the accused's failure to testify any more than was the analogous statement in *Peden*.

In any event, even if the prosecutor's remarks must be understood to be freighted with impermissible innuendo, the trial court's handling of the situation cured the error. The prosecutor was *immediately* and *publicly admonished* not to argue the absence of evidence (J.A. 80). See *White* v. *United States, supra*. The jury was also instructed to ignore the prosecutor's remark (J.A. 81). Beyond that, the trial court did not relate the remark to the accused's failure to testify and hence the instruction did not have the effect of underlining the error. *Cf. Stewart* v. *United States*, 366 U.S. 1 (1961).

III. There was no error in the sentencing process

In imposing sentence upon appellant, the trial judge requested that the Bureau of Prisons furnish him with a psychiatric evaluation of appellant within sixty days, the time specified for reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure (J.A. 116).

Thereafter, the appellant noted his appeal from his conviction; he also elected not to begin service of his sentence pending appeal (J.A. 117–118). As a result of appellant's election, the Bureau of Prisons could not take custody of appellant nor could they conduct the psychiatric examination as requested by the District Court.

In *Leach* v. *United States*, No. 17549, D.C. Cir., decided April 25, 1963, this Court indicated that it would serve the interests of society if the District Court would avail itself, incident to the sentencing process, of the various facilities for psychiatric evaluation of prisoners. The District Court followed the sug-

gestion of the Court of Appeals in this case. *Leach* did not require that any particular psychiatric service be utilized in preference over the other.

Examination of the appellant by the Bureau of Prisons will be possible after his appeal or petition for certiorari is disposed of. Rule 35 empowers the District Court to reduce or modify a sentence within 60 days of either of these events. Thus, appellant's election not to begin service of his sentence pending appeal foreclosed neither his psychiatric examination nor a reconsideration of his sentence; it merely postponed them.

In substance, appellant was offered a benefit by the District Court to which he had no legal claim. He delayed the implementation of that benefit by his own election. Under these circumstances, appellant should not be heard to argue that his rights have been offended.

CONCLUSION

Wherefore, it is respectfully requested that the judgment of the District Court be affirmed.

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